

[Cite as *Estep v. State*, 2009-Ohio-4349.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

DAVID ESTEP,

Petitioner-Appellant,

vs.

STATE OF OHIO,

Respondent-Appellee.

:

Case No. 09CA3088

:

: DECISION AND JUDGMENT ENTRY

:

APPEARANCES:

COUNSEL FOR APPELLANT: David Estep, No. 547-929, P.O. Box 7010,
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CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:8-20-09

ABELE, J.

{¶ 1} This is an appeal from a Ross County Common Pleas Court judgment that dismissed a habeas corpus petition filed by David Estep, petitioner below and appellant herein.

{¶ 2} Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

“THE COURT OF COMMON PLEAS ERRED WHEN IT DISMISSED APPELLANT’S PETITION FOR A WRIT OF HABEAS CORPUS FOR FAILURE TO VERIFY.”

SECOND ASSIGNMENT OF ERROR:

“THE COURT OF COMMON PLEAS VIOLATED PETITIONER’S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS WHEN IT ALLOWED TO STAND THE VOID JUDGEMENT OF A COURT THAT LACKED SUBJECT MATTER JURISDICTION.”

{¶ 3} In 2007, appellant pled guilty to felonious assault (sentenced to four years in prison), kidnapping (sentenced to six years in prison), tampering with evidence (sentenced to one year in prison) and aggravated robbery (sentenced to four years in prison). All sentences were ordered to be served consecutively with one another for a total term of fifteen years imprisonment.

{¶ 4} On August 5, 2008, appellant filed a petition for a writ of habeas corpus. Appellant alleged that the sentencing court had no jurisdiction over him because the Marion County Grand Jury's indictment was defective. The State filed a Civ.R. 12(B)(6) motion to dismiss and argued that (1) the petition was not verified as required by R.C. 2725.04, and (2) in any event, habeas corpus is not available to challenge a defective indictment. Appellant filed a memorandum contra. On December 10, 2008, the trial court granted the motion. This appeal followed.

{¶ 5} We jointly consider the two assignments of error which both posit that the trial court erred by dismissing appellant’s petition for habeas corpus. When deciding a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim, trial courts must presume all factual allegations in a complaint to be true and make all reasonable inferences in favor of the nonmovant. State ex rel. Talwar v. State Med. Bd. of Ohio, 104 Ohio St.3d 290, 819 N.E.2d 654, 2004-Ohio-6410, at ¶5; Perez v. Cleveland (1993), 66 Ohio St.3d 397, 399, 613 N.E.2d 199; Mitchell v. Lawson Milk Co. (1988), 40 Ohio St.3d 190, 192,

532 N.E.2d 753. Dismissal is proper only if it appears beyond all doubt that the plaintiff can prove no set of facts which would entitle him to relief. See Maitland v. Ford Motor Co., 103 Ohio St.3d 463, 816 N.E.2d 1061, 2004-Ohio-5717, at ¶11; York v. Ohio State Highway Patrol (1991), 60 Ohio St.3d 143, 144, 573 N.E.2d 1063. Moreover, a dismissal for failure to state a claim is reviewed de novo, Clemets v. Heston (1985), 20 Ohio App.3d 132, 133, 485 N.E.2d 287; Walters v. Ghee (Apr. 1, 1998), Ross App. No. 96CA2254, meaning that we afford no deference to the trial court's decision and apply our own, independent review to determine if the requirements of Civ.R. 12(B)(6) were satisfied.

{¶ 6} Turning now to the petition itself, we note that the trial court correctly concluded that the petition was not verified (notarized) as R.C. 2725.04 requires.¹ Dismissal was thus appropriate. Chari v. Vore (2001), 91 Ohio St.3d 323, 328, 744 N.E.2d 763; also see In re Baby Boy Tyus, Franklin App. No. 02AP-1436, 2003-Ohio-4262, at ¶22. Appellant does not deny that his petition was unverified, but argues that the word “verify” as used in the statute carries a degree of “semantic confusion” and, as a layperson, he had no idea this required notarization. We are not persuaded.

{¶ 7} Appellant is not excused from following statutes simply because he is a layperson and is acting without counsel. If that were so, then no layperson would ever be bound by the criminal code. Moreover, in a motion for an extension of time that he

¹ Appellant's petition did contain an affidavit, but it only verified, inter alia, that he was at the Ross Correctional Institution. See R.C. 2725.04(C). It did not address the other information the statute requires to be verified.

filed in the trial court, appellant noted that prisoners at his institution have access to the “Westlaw” database in twenty minute increments. A quick search would have revealed case law indicating that the “verification” requirement is satisfied by notarization.

{¶ 8} While this alone is enough to justify dismissal, the trial court was also correct that habeas corpus cannot be used to challenge an indictment's alleged deficiencies. Galloway v. Money, 100 Ohio St .3d 74, 796 N.E.2d 528, 2003-Ohio-5060, ¶¶3 & 6; Turner v. Ishee, 98 Ohio St.3d 411, 786 N.E.2d 54, 2003-Ohio-1671, at ¶7. Appellant counters that the indictment failed to set forth a mens rea for any of the offenses and that this amounts to “structural error” which should be reviewed on habeas corpus. We disagree. This argument has been considered and rejected twice by our colleagues on the Seventh District Court of Appeals. Junius v. Eberlin, Belmont App. No. 08BE27, 2008-Ohio-6441, at ¶¶14 & 18; Starcher v. Eberlin, Belmont App. No. 08BE19, 2008-Ohio-5042, at ¶¶4 & 18. Like them, we find nothing to warrant deviation from the Ohio Supreme Court's directive that these issues are not appropriate for habeas corpus review.

{¶ 9} Accordingly, for these reasons, we hereby overrule both assignments of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross

County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion
For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.