

[Cite as *Pocsik v. Mohr*, 2014-Ohio-5826.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

ROBERT POCSIK

PETITIONER

VS.

GARY MOHR, DIRECTOR, et al.

RESPONDENTS

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CASE NO. 14 BE 44

OPINION AND
JUDGMENT ENTRY

CHARACTER OF PROCEEDINGS:

Petition for Writ of Habeas Corpus

JUDGMENT:

Dismissed.

APPEARANCES:

For Petitioner:

Atty. Dean W. Van Dress
Atty. Lindsey Wilber Grdina
Van Dress Law Office
46 Front Street
Berea, Ohio 44017

For Respondent:

Atty. Mike DeWine
Attorney General of Ohio
Atty. Gregory T. Hartke
Assistant Ohio Attorney General
Criminal Justice Section – Habeas Unit
615 West Superior Avenue, 11th Floor
Cleveland, Ohio 44113

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
56Hon. Mary DeGenaro

Dated: December 26, 2014

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PER CURIAM.

{¶1} Petitioner Robert Pocsik is an inmate at the Belmont Correctional Institution in Belmont County, Ohio. He has filed a petition for writ of habeas corpus against Respondents Gary C. Mohr, Director of the Ohio Department of Corrections and Rehabilitation and Michele Miller, Warden of the institution where he is incarcerated. Respondents have filed a motion to dismiss the petition. Respondents' motion is hereby sustained and the petition is dismissed.

Background

{¶2} In Cuyahoga County Case No. CR-11-55/021 Petitioner was indicted on three third degree felonies for driving under the influence, R.C. 4511.19(A)(1)(a), with forfeiture specifications, R.C. 2941.1417. Following his guilty plea to a single count, he was convicted and sentenced to four years incarceration and his driver's license was suspended for life. He was also sentenced to postrelease control for a period of three years and fined \$1,350.00 (12/8/11 J.E.) No direct appeal was ever filed. Judicial release was subsequently denied and an appeal from that denial was dismissed for lack of a final appealable order.

{¶3} On September 30, 2014 Petitioner filed this petition for writ of habeas corpus. He contends that his four year sentence is illegal in light of the changes made by Am.Sub.H.B. 86 to R.C. 2929.14(A)(3)(a), setting a maximum term of imprisonment of three years for a non-violent third degree felony. On October 16, 2014 Respondents filed a motion to dismiss the petition or in the alternative motion for summary judgment.

Analysis

{¶4} R.C. 2725.01 provides:

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.

{¶5} The writ of habeas corpus is an extraordinary writ and will only be issued in certain circumstances of unlawful restraint of a person's liberty where there is no adequate legal remedy of law, such as a direct appeal or postconviction relief. *In re Pianowski*, 7th Dist. No. 03 MA 16, 2003-Ohio-3881, ¶3, citing *State ex rel. Pirman v. Money*, 69 Ohio St.3d 591, 593, 635 N.E.2d 26 (1994). The burden is on the Petitioner to establish a right to release. *Halleck v. Koloski*, 4 Ohio St.2d 76, 77, 212 N.E.2d 601 (1965).

{¶6} Respondents have filed an alternative motion to dismiss for failure to state a claim [Civ.R. 12(B)(6)] or for summary judgment. The purpose of the Civ.R. 12(B)(6) motion is to test the sufficiency of the complaint. *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.*, 72 Ohio St.3d 94, 647 N.E.2d 788 (1995). For dismissal under Civ.R. 12(B)(6) it must appear beyond doubt that, even assuming all factual allegations in the complaint are true, the nonmoving party can prove no set of facts that would entitle that party to the relief requested. *Keith v. Bobby*, 117 Ohio St.3d 470, 2008-Ohio-1443, 884 N.E.2d 1067, ¶10. If the petition fails to meet the requirements for a properly filed petition for writ of habeas corpus, or fails to state a facially viable claim, it may be dismissed on motion by the respondent

or *sua sponte* by the court. *Flora v. N. Cent. Correctional Inst.*, 7th Dist. No. 04 BE 51, 2005-Ohio-2383, ¶5.

{¶7} When a civil action is filed against a governmental entity or employee, R.C. 2969.25(A) requires the petitioner to file an affidavit with the petition describing all civil actions and appeals he or she has filed in state or federal court within the past five years. Compliance with R.C. 2969.25(A) is mandatory, and failure to satisfy the statutory requirements is grounds for dismissal. *State ex rel. Washington v. Ohio Adult Parole Auth.*, 87 Ohio St.3d 258, 259, 719 N.E.2d 544 (1999). Petitioner did not list any civil actions filed in the last five years. Respondents point out that Petitioner did file a petition for writ of habeas corpus asserting the same grounds for relief as stated in this petition in Cuyahoga County, Ohio on September 4, 2014 under Case No. CA 14 101884. That petition was voluntarily dismissed on September 23, 2014 as Petitioner was not incarcerated in the jurisdiction of the Eighth District. As noted by Respondents, failure to comply with the provisions of R.C. 2969.25(A) requires dismissal of the petition. *Fuqua v. Williams*, 100 Ohio St.3d 211, 2003-Ohio-5533, 797 N.E.2d 982; *State ex rel. Zanders v. Ohio Parole Bd.*, 82 Ohio St.3d 421, 422, 1998-Ohio-219, 696 N.E.2d 594; *Smith v. Buchanan*, 7th Dist. No. 13 NO 407, 2014-Ohio-359, *Clark v. Miller*, 7th Dist. No. 13 BE 13, 2013-Ohio-2958; *Womack v. Warden of Belmont Correctional Inst.*, 7th Dist. No. 04 BE 58, 2005-Ohio-1344.

{¶8} In addition, the availability of a legal remedy precludes an action in habeas corpus. *State ex rel. Massie v. Rogers*, 77 Ohio St.3d 449, 450, 674 N.E.2d

1383 (1997). Petitioner did not file a direct appeal after conviction and sentence. It is well settled that sentencing errors cannot be attacked through an action in habeas corpus. *Id.*; *Roberts v. Knab*, 131 Ohio St.3d 60, 2012-Ohio-56, ¶1. Habeas corpus is not the appropriate vehicle for reviewing allegations of sentencing errors when that sentence was made by a court of proper jurisdiction. *Wayne v. Bobby*, 7th Dist. No. 02 BE 72, 2003-Ohio-3882, ¶14, citing R.C. 2725.05; *Majoros v. Collins*, 64 Ohio St.3d 442, 696 N.E.2d 1038 (1992); *State ex rel. Wynn v. Baker*, 61 Ohio St.3d 464, 575 N.E.2d 208 (1991). Where direct appeal and postconviction relief are available to challenge a sentence, a habeas petition may properly be dismissed. *Rogers, supra*.

{¶9} Petitioner argues that he has completed the maximum sentence allowed (36 months) under R.C. 2929.14(A)(3) for a nonviolent felony of the third degree (as modified by Am.Sub.H.B. 86). Petitioner was sentenced to four years of imprisonment pursuant to R.C. 4511.19(G)(1)(e)(i) with forfeiture specifications. That sentencing statute allows for up to five years of imprisonment.

{¶10} Petitioner cites to the Eleventh Appellate District Case *State v. Owen*, 2013-Ohio-2824, 995 N.E.2d 911, in support of his position that when an OVI statute and a general sentencing statute are in conflict “the statute latest in date of enactment prevails.” *Id.* at ¶28. The Second District agreed with *Owen* and held:

Stated simply, under 4511.19(G)(1)(e)(i), the trial court has discretion to impose an additional prison term for a third-degree felony OVI offense, with a maximum aggregate sentence of five years. However, under

R.C. 2929.13(A) and R.C. 2929.14(B)(4), the maximum aggregate sentence for a third-degree felony OVI offense is 36 months. We agree with the Eleventh District that these provisions present an irreconcilable conflict and that the recent changes and more lenient provisions in R.C. Chapter 2929 must prevail.

State v. May, 2nd Dist. No. C.A. 25359, 2014-Ohio-1542, ¶29.

{¶11} A contrary view was expressed in the Tenth District case of *State v. Mercier*, 10th Dist. No. 13-AP-906, 2014-Ohio-2910. That Court held that under the plain and unambiguous language of R.C. 4511.19(G)(1) the sentencing provisions of 4511.19(G)(1)(e) applied, rather than any provision in R.C. Chapter 2929.

{¶12} In addition, the Ohio Supreme Court has accepted for review the certified question:

When a defendant is convicted of a R.C. 2941.1413 specification, does Ohio's OVI statute, R.C. 4511.19 prevail so that a five year sentence can be imposed for a third degree felony OVI or does R.C. 2929.14(A) require that the maximum sentence that can be imposed is three years?

State v. Smith, 139 Ohio St.3d 1402, 2014-Ohio-2245, 9 N.E.2d 1061.

{¶13} All of the cases which have addressed the issue have done so in direct appeals after conviction, not extraordinary actions of habeas corpus years after sentence was imposed. We further note that Am.Sub.H.B. 86 went into effect September 30, 2011 and Petitioner was sentenced on December 8, 2011. Both his plea and sentence occurred subsequent to Am.Sub.H.B. 86.

Conclusion

{¶14} For the reasons that Petitioner failed to attach the affidavit of all prior civil actions required by statute, his claimed sentencing errors are not reviewable in habeas corpus, Petitioner was sentenced by a court with proper jurisdiction and that there remains an available legal remedy of delayed appeal or postconviction relief, we grant the Respondents' motion to dismiss. Because this matter is being dismissed we need not address the claim raised by the Petitioner that he is being held on an illegal sentence.

{¶15} Petition dismissed. Costs taxed against Petitioner. Final order. Clerk to serve notice as provided by the Civil Rules.

Waite, J., concurs.

Donofrio, J., concurs.

DeGenaro, P.J., concurs.