

TENTH APPELLATE DISTRICT

In the State of Ohio ex rel. Kevin Hughley, :
Relator, :
v. : No. 09AP-586
Ohio Department of Rehabilitation : (REGULAR CALENDAR)
& Correction, :
Respondent. :
:

D E C I S I O N

Rendered on December 1, 2009

Kevin Hughley, pro se.

Richard Cordray, Attorney General, and *Lisa M. Eschbacher*,
for respondent.

IN MANDAMUS
ON MOTION TO DISMISS AND
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, Kevin Hughley, commenced this original action in mandamus seeking an order compelling respondent, Ohio Department of Rehabilitation and Correction, to delete from his sentence the nine-month prison term he received for his conviction of a motor vehicle title offense under R.C. 4505.19. Relator's sentence for this offense was consecutive to the sentences he received in two other cases. Respondent has filed a motion to dismiss.

{¶2} Pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that respondent does not have a clear legal duty to grant the relief relator seeks. In fact, the magistrate specifically determined that relator failed to state a claim because respondent lacks the authority to change relator's sentence. Accordingly, the magistrate has recommended that we grant respondent's motion to dismiss.

{¶3} Although relator has filed objections to the magistrate's decision, his objections address the alleged illegality of his nine-month sentence. Relator ignores the fundamental basis for the magistrate's decision—that respondent lacks the authority to change relator's sentence. Because it is clear that respondent lacks the authority to grant the relief relator seeks, we overrule relator's objections.

{¶4} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. We adopt the magistrate's findings of fact. However, we adopt only that portion of the magistrate's conclusions of law that determined respondent lacks the authority to grant the relief relator seeks. In accordance with the magistrate's decision, we grant respondent's motion to dismiss, and thereby deny relator's request for a writ of mandamus.

Objections overruled; motion to dismiss granted, and writ of mandamus denied.

FRENCH, P.J., and BRYANT, J., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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Relator,	:	
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v.	:	No. 09AP-586
	:	
Ohio Department of Rehabilitation & Correction,	:	(REGULAR CALENDAR)
	:	
Respondent.	:	
	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on August 17, 2009

Kevin Hughley, pro se.

Richard Cordray, Attorney General, and Lisa M. Eschbacher,
for respondent.

IN MANDAMUS
ON MOTION TO DISMISS

{¶5} Relator, Kevin Hughley, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Ohio Department of Rehabilitation and Correction, to correct his sentence on grounds that the trial court sentenced him to an incorrect number of months for one of the offenses of which he was convicted since, pursuant to R.C. 4505.19(B), a nine month sentence can only be served in the workhouse or county jail.

Findings of Fact:

{¶6} 1. Relator is an inmate currently incarcerated at Southeastern Correctional Institution. According to relator's affidavit of prior actions, this is the 25th action he has filed in the last 18 months.

{¶7} 2. In order to better understand relator's situation, the magistrate quotes from the Eighth District Court of Appeals decision in *State v. Hughley*, 8th Dist. No. 90323, 2009-Ohio-3274, wherein the court described the relevant convictions for which relator is currently incarcerated:

This appeal concerns three separate criminal cases. "Case One" is *State v. Kevin Hughley*, Cuyahoga County Common Pleas Court Case No. CR-462014, in which a jury found Hughley guilty of six counts of forgery, six counts of uttering and five counts of tampering with records, as shown by the indictments and verdict forms. The trial court sentenced Hughley to two years on each the tampering counts to be served concurrently but consecutive to nine months on the forgery and uttering counts, which merged. "Case Two" is *State v. Kevin Hughley*, Cuyahoga County Common Pleas Court Case No. CR473878, in which the court found him guilty of one count each of forgery and uttering; the court merged the two offenses for sentencing and imposed a nine month sentence to be served consecutively to the sentences in the other two cases. "Case Three" is *State v. Kevin Hughley*, Cuyahoga County Common Pleas Court Case No. CR. 481899, in which the court found him guilty of committing a motor vehicle title offense under R.C. 4505.19 and sentenced him to nine months consecutive to the other two cases.

Id. at ¶1, fn. 1.

{¶8} 3. According to his complaint, relator contends that one of his sentences cannot be served at Southeastern Correctional Institution because his sentence on that particular count was less than one year. In the aforementioned case, relator filed an App.R. 26(B) motion arguing that his appellate counsel was ineffective for failing to

argue various issues. According to the court's decision, one of the issues raised by relator is the same issue he raises here:

Hughley's first contention is that his appellate counsel should have argued that his sentence for Case Three is improper. R.C. 4505.19, Title Offenses, prohibits a variety of improprieties relating to the transfer and sale of motor vehicles. The trial court found Hughley guilty of unlawfully and knowingly obtaining goods, services or money by means of an invalid, fictitious, forged, counterfeit, stolen or unlawfully obtained bill of sale of a motor vehicle. The trial court sentenced him to nine months at the Lorain Correctional Institution.

* * * Accordingly, Hughley submits that a nine-month sentence in a state correctional institution is contrary to the statute and is a void, improper sentence, which this court would have reversed and remanded for resentencing, if his appellate counsel had argued it.

Id. at ¶6-7.

{¶9} 4. In rejecting relator's argument, the court noted that, had counsel raised that issue, the trial court could just as easily have added 3 months to his sentence so that his 9 month sentence would have become a 12 month sentence.

{¶10} 5. Respondent has filed a motion to dismiss arguing, in part, that this court is without jurisdiction to grant the relief relator requests since only the sentencing court could remove the sentence. Respondent argues further that relator simply does not have a clear legal right to the relief he requests.

{¶11} 6. The magistrate notes that in the aforementioned case, the Eighth District Court of Appeals noted that relator had filed a motion asking the court to remand his case to the trial court for resentencing based upon the same arguments relator makes here. According to the court's decision, that motion was denied on December 2, 2008.

{¶12} 7. Relator has filed a response to respondent's motion to dismiss.

{¶13} 8. The motion is currently before the magistrate.

Conclusions of Law:

{¶14} A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545. In reviewing the complaint, the court must take all the material allegations as admitted and construe all reasonable inferences in favor of the nonmoving party. *Id.*

{¶15} In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that relator can prove no set of facts entitling him to recovery. *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242. As such, a complaint for writ of mandamus is not subject to dismissal under Civ.R. 12(B)(6) if the complaint alleges the existence of a legal duty by the respondent and the lack of an adequate remedy at law for relator with sufficient particularity to put the respondent on notice of the substance of the claim being asserted against it, and it appears that relator might prove some set of facts entitling him to relief. *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.* (1995), 72 Ohio St.3d 94. For the following reasons, respondent's motion should be granted and relator's complaint should be dismissed.

{¶16} For the reasons that follow, it is this magistrate's conclusion that this court should grant respondent's motion and dismiss relator's complaint.

{¶17} First, respondent is correct in asserting that any challenge relator has to his sentence needs to be addressed by the court in which he was sentenced. Although

relator believes that respondent is both authorized and required to remove his nine month sentence because, in his opinion, it is void, it is not respondent's responsibility.

{¶18} Second, as indicated in the findings of fact, relator was convicted and sentenced on multiple counts. It is undisputed that relator is serving a sentence in excess of nine months based on his convictions for these multiple counts. If relator's argument was accepted, it appears he would serve part of his sentence in a state facility and this nine month sentence in the county jail or workhouse. Clearly, that would lead to an absurd result and the magistrate doubts that the legislature intended that result when the statute was drafted.

{¶19} Because respondent does not have the authority and is not required to remove this sentence and because relator is serving a sentence on multiple counts, it is this magistrate's conclusion that relator has not demonstrated that respondent has a clear legal duty to provide the relief relator seeks, and respondent's motion to dismiss should be granted.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).