

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

[State ex rel.] Javier Humberto, :  
Relator, :  
v. : No. 16AP-328  
Judge [Richard A.] Frye, : (REGULAR CALENDAR)  
Respondent. :

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D E C I S I O N

Rendered on September 30, 2016

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**On brief:** *Javier Humberto, pro se.*

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IN MANDAMUS

BROWN, J.

{¶ 1} Relator, Javier Humberto, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, the Honorable Richard A. Frye, a judge of the Franklin County Court of Common Pleas, to grant relator's motion to vacate non-final/void judgment that respondent denied on April 28, 2016.

{¶ 2} This matter was referred to a magistrate of this court, pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, including findings of fact and conclusions of law, and recommended that this court sua sponte dismiss the action because relator failed to comply with the requirements of R.C. 2969.25(C). No objections have been filed to that decision.

{¶ 3} As there have been no objections filed to the magistrate's decision, and it contains no error of law or other defect on its face, based on an independent review of the

file, this court adopts the magistrate's decision. We dismiss relator's complaint in mandamus.

*Action dismissed.*

KLATT and SADLER, JJ., concur.

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APPENDIX  
IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

[State ex rel.] Javier Humberto,	:	
Relator,	:	
v.	:	No. 16AP-328
Judge [Richard A. Frye],	:	(REGULAR CALENDAR)
Respondent.	:	

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MAGISTRATE'S DECISION

Rendered on May 12, 2016

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*Javier Humberto, pro se.*

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IN MANDAMUS  
ON SUA SPONTE DISMISSAL

{¶ 4} Relator, Javier Humberto, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, the Honorable Richard A. Frye, a judge of the Franklin County Court of Common Pleas, to grant his motion to vacate Non-final/Void Judgment which respondent denied on April 28, 2016.

Findings of Fact:

{¶ 5} 1. Relator is an inmate currently incarcerated at Ross Correctional Institution.

{¶ 6} 2. On April 28, 2010, a jury returned a verdict in Franklin C.P. No. 08CR-8935 finding relator guilty of murder with specification in violation of R.C. 2903.02,

attempted murder with specification in violation of R.C. 2923.02, and felonious assault with specification in violation of R.C. 2903.11.<sup>1</sup>

{¶ 7} 3. Relator filed a notice of appeal from his convictions and sentence in this court. In that appeal, relator did not raise, as an assignment of error, any defect in the trial court's sentencing entry.

{¶ 8} 4. In *State v. Humberto*, 10th Dist. No. 10AP-527, 2011-Ohio-3080, this court overruled relator's three assignments of error and affirmed relator's convictions. Relator's appeal to the Supreme Court of Ohio was denied.

{¶ 9} 5. On December 13, 2012, relator filed a motion to "Vacate Sentence and Void Conviction," which the trial court denied on April 2, 2013.

{¶ 10} 6. This court dismissed relator's appeal from that post-trial ruling on July 24, 2013 and further denied relator's application for reopening in a memorandum decision on June 2, 2015.

{¶ 11} 7. The Supreme Court denied further review on September 16, 2015.

{¶ 12} 8. On January 14, 2016, relator filed a "Motion to Vacate Non-Final/Void Judgment of Conviction" reportedly pursuant to Crim.R. 32.

{¶ 13} 9. In a journal entry filed January 28, 2016, the trial court dismissed, for lack of jurisdiction, relator's motion finding that it was not filed within 180 days after the filing of the trial transcript in the Tenth District Court of Appeals and further that, because this issue could have been raised in his direct appeal, the doctrine of res judicata precluded re-examination of that issue.

{¶ 14} 10. Relator filed this mandamus action on April 28, 2016. At the time he filed this action, relator filed an affidavit of indigency; however, relator did not include a statement of the amount in his inmate account for each of the preceding six months as certified by the institutional cashier nor did he include a statement of all other cash and things of value he owns.

{¶ 15} 11. On May 9, 2016, relator filed a motion to amend his complaint and acknowledges his failure to include the requisite cashier's statement.

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<sup>1</sup> A review of the indictments shows that the specification involved was a firearm specification and further, the verdicts signed by each of the jurors includes verdicts related to the gun specifications.

**Conclusions of Law:**

{¶ 16} The magistrate recommends that this court sua sponte dismiss this action because relator has failed to comply with the requirements of R.C. 2969.25(C).

{¶ 17} In regard to filing fees, R.C. 2969.25(C) and 2969.22 distinguish between paying the full amount of filing fees upon filing (referred to as "prepayment" of fees) and paying the fees pursuant to periodic deductions from the inmate's account maintained by the prison.<sup>2</sup> Under R.C. 2969.25(C), an inmate who seeks waiver of prepayment on the grounds of indigency must file an affidavit that includes: (1) a statement of the amount in the inmate's account for each of the preceding six months as certified by the institutional cashier, and (2) a statement of all other cash and things of value owned by the inmate.

{¶ 18} Compliance with the provisions of R.C. 2969.25 is mandatory and the failure to satisfy the statutory requirements is grounds for dismissal of the action. *State ex rel. Washington v. Ohio Adult Parole Auth.*, 87 Ohio St.3d 258 (1999); *State ex rel. Zanders v. Ohio Parole Bd.*, 82 Ohio St.3d 421 (1998); *State ex rel. Alford v. Winters*, 80 Ohio St.3d 285 (1997).

{¶ 19} In *State ex rel. Pamer v. Collier*, 108 Ohio St.3d 492, 2006-Ohio-1507, the Supreme Court of Ohio affirmed the judgment of the court of appeals from Medina County which had dismissed the complaint of George D. Pamer, an inmate at Mansfield Correctional Institution, for his failure to comply with the requirements of R.C. 2969.25(C). Specifically, the court stated:

Pamer's cashier statement did not set forth the account balance for the month immediately preceding his mandamus complaint--August 2005. See R.C. 2969.25(C)(1), which requires an inmate filing a civil action against a government employee seeking waiver of prepayment of court filing fees to file a "statement that sets forth the balance in the inmate account for each of the preceding six months, as certified by the institutional cashier." Pamer's failure to comply with R.C. 2969.25(C)(1) warranted dismissal of the complaint. *State ex rel. Foster v. Belmont Cty. Court of Common Pleas*, 107 Ohio St.3d 195, 2005-Ohio-6184, 837 N.E.2d 777, ¶ 5.

In addition, nothing in R.C. 2969.25 required the court of appeals to afford Pamer the opportunity to pay the requisite

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<sup>2</sup>Under the statute, when the inmate has submitted the requisite affidavit of indigency, the clerk charges the inmate's account for funds in excess of ten dollars. Following that payment, all income in the inmate's account (excluding the ten dollars) is forwarded to the clerk each month until the fees are paid.

filing fee before dismissing the case when Pamer expressly requested waiver of prepayment of those fees.

Finally, because Pamer did not prevail and did not establish his indigency, the court of appeals did not abuse its discretion in ordering him to pay the costs of the proceeding. See *State ex rel. Frailey v. Wolfe* (2001), 92 Ohio St.3d 320, 321, 750 N.E.2d 164; Civ.R. 54(D).

*Id.* at ¶ 5-7.

{¶ 20} Likewise, in *State ex rel. Ridenour v. Brunzman*, 117 Ohio St.3d 260, 2008-Ohio-854, the Supreme Court affirmed the judgment of the Ross County Court of Appeals which had dismissed the complaint filed by William L. Ridenour because of his failure to comply with R.C. 2969.25(C). In that case, Ridenour had filed a motion for reconsideration attaching a statement setting forth his inmate account balance for the six months preceding the filing of his complaint; however, the statement was not certified by the prison cashier.

{¶ 21} In affirming the judgment of the appellate court, the Supreme Court stated:

"The 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, P 5. Ridenour failed to comply with R.C. 2969.25(C)(1), which requires an inmate filing a civil action against a government employee seeking waiver of prepayment of court filing fees to file with the complaint a "statement that sets forth the balance in the inmate account of the inmate for each of the preceding six months, as certified by the institutional cashier."

Moreover, although Ridenour claims that the court erred in failing to grant him leave to amend his complaint to comply with R.C. 2969.25(C)(1), he never filed a motion to amend his complaint. Instead, he filed a motion for reconsideration, which was "a nullity because his mandamus action was filed originally in the court of appeals, rendering App.R. 26(A) inapplicable." *State ex rel. Washington v. Crush*, 106 Ohio St.3d 60, 2005 Ohio 3675, 831 N.E.2d 432, P 5.

*Id.* at ¶ 5-6.

{¶ 22} Pursuant to the above-cited authority and because relator cannot cure this deficiency now or at a later date, it is this magistrate's decision that this court should

dismiss relator's complaint. Further, pursuant to the above-cited authority, inasmuch as relator did not prevail and did not establish indigency, this court should order relator to pay the costs of the proceedings.

/S/ MAGISTRATE  
STEPHANIE BISCA

### **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).