

[Cite as *State ex rel. Menefee v. Burnside*, 2009-Ohio-5842.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93702

**STATE OF OHIO, EX REL.,
DAVID MENEFEE**

RELATOR

vs.

HONORABLE JUDGE JANET BURNSIDE

RESPONDENT

**JUDGMENT:
WRIT DENIED**

WRIT OF MANDAMUS
MOTION NO. 425368
ORDER NO. 427509

RELEASE DATE: November 2, 2009

FOR RELATOR

David Menefee, #492-189, pro se
Hocking Hills Correctional Facility
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Nelsonville, Ohio 45764

ATTORNEYS FOR RESPONDENT

William D. Mason
Cuyahoga County Prosecutor

By: James E. Moss
Assistant County Prosecutor
8th Floor Justice Center
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Cleveland, Ohio 44113

COLLEEN CONWAY COONEY, A.J.:

{¶ 1} On July 30, 2009, the relator, David Menefee, commenced this mandamus action against the respondent, Judge Janet Burnside, to compel the judge to grant him an additional seven days of jail-time credit in the underlying case, *State v. Menefee*, Cuyahoga County Common Pleas Court Case No. CR-463476. The respondent, through the Cuyahoga County Prosecutor, moved for summary judgment on the grounds of procedural defects and an adequate

remedy at law. For the following reasons, this court grants the motion for summary judgment and denies the application for a writ of mandamus.

{¶ 2} In the underlying case, a jury convicted Menefee in September 2005, of rape, kidnapping, and gross sexual imposition, and the judge sentenced him to six years in prison and granted him 31 days of jail-time credit. On July 13, 2009, Menefee filed a motion for an additional seven days of jail-time credit, which the judge denied on July 17, 2009. Menefee then commenced this mandamus action.

{¶ 3} The requisites for mandamus are well established: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief, and (3) there must be no adequate remedy at law. Additionally, although mandamus may be used to compel a court to exercise judgment or to discharge a function, it may not control judicial discretion, even if that discretion is grossly abused. *State ex rel. Ney v. Niehaus* (1987), 33 Ohio St.3d 118, 515 N.E.2d 914. Furthermore, mandamus is not a substitute for appeal. *State ex rel. Keenan v. Calabrese* (1994), 69 Ohio St.3d 176, 631 N.E.2d 119; *State ex rel. Daggett v. Gessaman* (1973), 34 Ohio St.2d 55, 295 N.E.2d 659; and *State ex rel. Pressley v. Indus. Comm. of Ohio* (1967), 11 Ohio St.2d 141, 228 N.E.2d 631, paragraph three of the syllabus.

Furthermore, if the relator had an adequate remedy, regardless of whether it was used, relief in mandamus is precluded. *State ex rel. Tran v. McGrath*, 78 Ohio St.3d 45, 1997-Ohio-245, 676 N.E.2d 108 and *State ex rel. Boardwalk Shopping Ctr., Inc. v. Court of Appeals for Cuyahoga Cty.* (1990), 56 Ohio St.3d 33, 564 N.E.2d 86. Moreover, mandamus is an extraordinary remedy that is to be exercised with caution and only when the right is clear. It should not issue in doubtful cases. *State ex rel. Taylor v. Glasser* (1977), 50 Ohio St.2d 165, 364 N.E.2d 1; *State ex rel. Shafer v. Ohio Turnpike Comm.* (1953), 159 Ohio St. 581, 113 N.E.2d 14; *State ex rel. Connole v. Cleveland Bd. of Edn.* (1993), 87 Ohio App.3d 43, 621 N.E.2d 850; and *State ex rel. Dayton-Oakwood Press v. Dissinger* (1940), 32 Ohio Law Abs. 308.

{¶ 4} A defendant, who is imprisoned, is entitled by law to have credited to his sentence of incarceration the number of days that he was confined prior to conviction and sentence. See R.C. 2949.08, 2949.12, 2967.191, and *State ex rel. Sanchez v. Cuyahoga Cty. Common Pleas Court* (May 22, 1997), Cuyahoga App. No. 72085. In addition, a trial court has the clear legal duty to specify in the record of conviction and sentence the number of days a defendant was confined prior to conviction. Ohio Adm. Code 5120-2-04(B); *State ex rel. Rankin v. Ohio*

Adult Parole Auth., 98 Ohio St.3d 476, 2003-Ohio-2061, 786 N.E.2d 1286; and *State ex rel. Corder v. Wilson* (1991), 68 Ohio App.3d 567, 589 N.E.2d 113.

{¶ 5} In the present case, the respondent judge fulfilled her duty by specifying the number of days of jail-time credit in the sentencing entry. Her denial of Menefee's subsequent motion for additional jail-time credit was an exercise of discretion for which Menefee has or had an adequate remedy at law through appeal. *Rankin*, supra. Therefore, he cannot satisfy the requisites for mandamus, and this court denies his application for a writ.¹ Costs assessed against relator. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

PATRICIA A. BLACKMON, J., and
LARRY A. JONES, J., CONCUR

¹ In his brief in opposition, Menefee cured his lack of a supporting affidavit under Loc.App.R. 45 and his lack of a proper poverty affidavit under R.C. 2969.25. Thus, the court declines to deny the writ on procedural grounds.