

[Cite as *State ex rel. Flakes v. Russo*, 2009-Ohio-6474.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94044

**STATE OF OHIO EX REL.,
ARIYEN FLAKES**

RELATOR

vs.

JUDGE JOSEPH RUSSO

RESPONDENT

**JUDGMENT:
WRIT DENIED**

Writ of Mandamus
Motion No. 427683 and 427739
Order No. 428747

RELEASE DATE: December 9, 2009

FOR RELATOR

Ariyen Flakes, pro se
Inmate No. 562-729
Belmont Correctional Inst.
P. O. Box 540
St. Clairsville, Ohio 43950

ATTORNEYS FOR RESPONDENT

William D. Mason
Cuyahoga County Prosecutor

BY: James E. Moss
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

KENNETH A. ROCCO, J.:

{¶ 1} On October 6, 2009, the relator, Ariyen Flakes, commenced this mandamus action against the respondent, Judge Joseph Russo, to compel the judge to grant him all the proper jail-time credit to which he is due in the underlying cases, *State v. Flakes*, Cuyahoga County Common Pleas Court Case Nos. CR-487424 and CR-492623. Flakes asserts he is entitled to 269 days of credit. On October 26, 2009, the respondent, through the Cuyahoga County Prosecutor, moved for summary judgment on the grounds of mootness and pleading deficiencies. On October 27, 2009, the prosecutor submitted an amended motion for summary judgment which attached journal entries from the

underlying cases. Flakes did not timely file a response. For the following reasons, this court grants the respondent's motion for summary judgment and denies the application for a writ of mandamus.

{¶ 2} In the underlying cases in 2008, Flakes pleaded guilty to drug trafficking, and the trial court sentenced him to three years. In the sentencing entries, the trial court granted him 95 days of jail-time credit. On April 8, 2009, Flakes filed a motion for jail-time credit in the underlying cases. On April 17, 2009, the judge in both cases granted him an additional 20 days, for a total of 115 days of credit. Flakes then commenced this mandamus action to get the "proper credit."

{¶ 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 Center, 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. R.C. 2949.08; R.C. 2949.12; R.C. 2967.191; and *State ex rel. Sanchez v. Cuyahoga County 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 Authority*, 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. Once the trial court has specified the number of days of credit, appeal is the proper remedy to correct any error. *Corder and Rankin*.

{¶ 5} In the present case, the respondent judge fulfilled his duty by specifying the number of days of jail-time credit in the sentencing entry and by granting further jail-time credit in resolving Flakes' April 8, 2009 motions. The judge's determination of the amount of jail-time credit was an exercise of discretion for which Flakes has or had an adequate remedy at law through appeal. Therefore, Flakes cannot satisfy the requisites for mandamus.

{¶ 6} Additionally, the relator failed to support his complaint with an affidavit "specifying the details of the claim" as required by Local Rule 45(B)(1)(a).

State ex rel. Wilson v. Calabrese (Jan. 18, 1996), Cuyahoga App. No. 70077, and *State ex rel. Smith v. McMonagle* (July 17, 1996), Cuyahoga App. No. 70899.

{¶ 7} Although Flakes submitted a poverty affidavit citing R.C. 2969.25, he did not attach the required statement from the prison cashier stating the amount of money in Flakes' prison account for the last six months. These are sufficient reasons to deny the writ and assess costs against Flakes.

{¶ 8} Accordingly, the court grants the respondent's motion for summary judgment and denies the writ. Costs assessed against the 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).

KENNETH A. ROCCO, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR