

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

DAVID A. NIXON,	:	PER CURIAM OPINION
Relator,	:	
- vs -	:	CASE NO. 2018-P-0055
PORTAGE COUNTY COURT OF COMMON PLEAS, et al.,	:	
Respondents.	:	

Original Action for Writ of Habeas Corpus.

Judgment: Petition dismissed.

David A. Nixon, pro se, Portage County Jail, 8240 Infirmary Road, Ravenna, OH 44266 (Relator).

Portage County Court of Common Pleas, pro se, 203 West Main Street, Ravenna, OH 44266 (Respondent).

Victor V. Viglucci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Respondent, Honorable Becky Doherty).

PER CURIAM.

{¶1} This matter is before the court on the petition for writ of habeas corpus, filed by relator, David A. Nixon. Mr. Nixon named as respondent the Portage County Common Pleas Court “Honorable Becky L. Doherty” claiming that, due to a sentencing error, Judge Doherty did not have jurisdiction to place him on probation or arrest him for

failure to appear for a scheduled status hearing. Judge Doherty, through the county prosecutor's office, responded by filing a motion to dismiss. Because Mr. Nixon's petition is fatally defective, we grant the motion to dismiss.

{¶2} In February 2017, Mr. Nixon pled guilty to one count of domestic violence and one count of violating a protection order. He was sentenced to three years in prison on the count of domestic violence and one year in prison for the violation of a protection order. The record reflects that at the sentencing hearing Judge Doherty unambiguously and repeatedly told Mr. Nixon his sentences were to run consecutively. The sentencing entry did not, however, specify whether the sentences ran consecutively or concurrently, and the Ohio Department of Rehabilitation and Correction records incorrectly reflected concurrent sentences. Judge Doherty corrected the entry with a nunc pro tunc entry on April 4, 2018, which Mr. Nixon did not appeal.

{¶3} On October 11, 2017, the trial court granted Mr. Nixon judicial release and ordered him to report to the C.A.T.S. program. He was placed under the intensive supervision program of the Adult Probation Department for 12 months to be followed by 48 months under the general control of the Department. Additionally, Mr. Nixon was ordered to abide by special terms and conditions including, inter alia, undergoing a substance abuse and mental health evaluation, and an anger management program. Mr. Nixon has failed to complete all the special terms and conditions. After failing to appear for a scheduled status hearing on February 20, 2018, a warrant was issued for his arrest and Mr. Nixon was arrested on March 19, 2018. He remains in custody.

{¶4} Our independent research shows Mr. Nixon has filed numerous motions and petitions with the trial court, including a pro se petition for writ of habeas corpus on

May 9, 2018, which was dismissed as fatally defective. Mr. Nixon filed the instant action, his second pro se petition for writ of habeas corpus, on July 27, 2018, with this court and the matter is now before us. In summary, this second petition alleges the trial court had no legal authority or jurisdiction over his probation sentence or to issue the nunc pro tunc entry correcting his sentence because his sentences ran concurrently and he has fully served time for the violation of the probation order. He states his Constitutional rights have been and are being violated but makes no legal arguments to support these assertions.

{¶5} Initially we note, as Judge Doherty’s motion to dismiss notes, Mr. Nixon’s petition is defective in that it fails to name the proper respondent. R.C. 2725.04 requires a writ of habeas corpus to name “the person by whom the prisoner is so confined or restrained.” *Id.* Mr. Nixon names Judge Doherty, who is not his custodian. “In applying this statute, this court has held that the proper respondent in most habeas corpus actions is the jailor or warden of the penitentiary in which the petitioner is being detained.” *Sellers v. State*, 11th Dist. Trumbull No. 99-T-0117, 1999 Ohio App. LEXIS 4861, *2-3 (Oct. 15, 1999), citing *Lucero v. State*, 11th Dist. Ashtabula No. 97-A-0085, 1998 Ohio App. LEXIS 994 (Mar. 13, 1998). On this failure alone, Mr. Nixon’s petition is fatally defective. See *State ex rel. Sherrills v. State*, 91 Ohio St.3d 133 (2001); *State ex rel. Johnson v. Ohio Adult Parole Auth.*, 4th Dist. Scioto No. 99 CA 2678, 2000 WL 343106, *4, aff’d, 90 Ohio St.3d 208 (2000), citing *Sellers, supra*; *Boyd v. McGinty*, 8th Dist. Cuyahoga No. 84476, 2004-Ohio-2704, ¶2.

{¶6} Furthermore, Mr. Nixon failed to comply with R.C. 2969.25, requiring any inmate commencing a civil action or appeal against a government entity or employee to

include “an affidavit that contains a description of each civil action or appeal of a civil action that the inmate has filed in the previous five years in any state or federal court.”

Id. No such affidavit was submitted. Thus, Mr. Nixon’s petition is also defective on this ground.

{¶7} Finally, habeas corpus will not lie when the petitioner has or had adequate remedies at law. *State ex rel. Drake v. Fuerst*, 8th Dist. Cuyahoga No. 76001, 1999 WL 328725, *1 (May 20, 1999), citing *Padavick v. Cleveland Heights*, 34 Ohio St.2d 15 (1973) and *Thomas v. Huffman*, 84 Ohio St.3d 266 (1998). The Supreme Court of Ohio has held “habeas corpus is an extraordinary remedy and as with every extraordinary remedy is not available as a means of relief where there is an adequate remedy in the ordinary course of law.” *Howard v. Catholic Social Serv. of Cuyahoga Cty., Inc.*, 70 Ohio St.3d 141, 145 (1994), citing *In re Davis*, 18 Ohio St.3d 226, 227 (1985). As such, habeas corpus may not be used as a substitute for appeal. *Howard, supra* at 146. Mr. Nixon had the opportunity to appeal the dismissal of his prior petition for writ of habeas corpus, or the nunc pro tunc filing of the Portage County Common Pleas Court correcting his sentencing entry. Thus, he is precluded from seeking such relief through habeas corpus.

{¶8} Because Mr. Nixon’s petition is fatally defective, and he had or has an available remedy at law, we do not address the merits of his petition. Accordingly, Mr. Nixon’s petition is dismissed and Judge Doherty’s motion to dismiss is granted.

THOMAS R. WRIGHT, P.J., DIANE V. GRENDALL, J., CYNTHIA WESTCOTT RICE, J., concur.