

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE EX REL. DEREK LICHTENWALTER	:	JUDGES: Hon. Julie A. Edwards, P.J. Hon. W. Scott Gwin, J. Hon. Patricia A. Delaney, J.
Relator	:	
-vs-	:	Case No. 2010AP050017
JUDGE ELIZABETH LEHIGH THOMAKOS, TUSCARAWAS COUNTY COURT OF COMMON PLEAS	:	<u>OPINION</u>
Respondent	:	

CHARACTER OF PROCEEDING:	Writ
JUDGMENT:	Denied
DATE OF JUDGMENT ENTRY:	October 18, 2010

APPEARANCES:	
For Relator	For Respondent
DEREK LICHTENWALTER PRO SE N.C.C.T.F. #564-988 2000 South Avon Belden Road Grafton, OH 44044	ROBERT R. STEPHENSON II 125 East High Avenue New Philadelphia, OH 44663

Gwin, J.

{¶1} Relator, Derek Lichtenwalter, has filed an “Original Action in a Writ of Mandamus.” Relator has also filed a motion for default judgment or summary judgment. Respondent has filed an Answer as well as a motion for summary judgment.

{¶2} In Relator’s motion for default judgment, he argues he is entitled to judgment because Respondent failed to file an answer or otherwise plead within 21 days of service of the complaint. Relator cites S.Ct. R. X for the proposition Respondent has only 21 days to file an answer. S.Ct. R. X does not apply to actions in the courts of appeals. Rather, our Loc.R. 4(A) provides in part that original actions “shall commence upon the filing of a complaint and proceed as a civil case under the Ohio Rules of Civil Procedure . . .” Ohio Civ.R. 12(A) provides in part, “(A) **When answer presented** (1) *Generally*. The defendant shall serve his answer within twenty-eight days after service of the summons and complaint upon him;” The Complaint was served upon Respondent on May 14, 2010. Pursuant to Ohio Civ.R. 12(A), an answer was due on or before twenty-eight days which would be on or before June 11, 2010. Respondent timely filed an answer on June 3, 2010. Further, pursuant to Civ. R. 55(D), Relator would not be entitled to a default judgment even had Respondent failed to file an answer. For these reasons, Relator’s motion for default or summary judgment is denied.

{¶3} The basis for the complaint is the trial court’s failure to merge offenses which Relator claims are allied offenses. Relator also appears to argue a writ should issue because he was not given the appropriate amount of jail time credit.

{¶4} For a writ of mandamus to issue, the relator must have a clear legal right to the relief prayed for, the respondents must be under a clear legal duty to perform the requested act, and relator must have no plain and adequate remedy in the ordinary course of law. *State, ex rel. Berger, v. McMonagle* (1983), 6 Ohio St.3d 28, 6 OBR 50, 451 N.E.2d 225.

{¶5} The Supreme Court has held mandamus does not lie to challenge a trial court's failure to award jail time credit stating, "[A]n adequate remedy at law by appeal [exists] to raise any error by the trial court in calculating his jail-time credit. *State ex rel. Brown v. Summit Cty. Court of Common Pleas*, 99 Ohio St.3d 409, 2003-Ohio-4126, 792 N.E.2d 1123, ¶ 4." *State ex rel. Rudolph v. Horton* (2008), 119 Ohio St.3d 350, 351, 894 N.E.2d 49, 50.

{¶6} Further, we find Relator has or had an adequate remedy at law by way of direct appeal to challenge any sentencing error relative to the issue of allied offenses. See *Hunter v. Sutula* 2006 WL 225526, 2 (Ohio App. 8 Dist.).

{¶7} Because Relator has or had an adequate remedy at law to challenge his sentence and jail time credit, a writ of mandamus does not lie. For this reason, we grant Respondent's motion for summary judgment.

{¶8} RESPONDENT'S MOTION FOR SUMMARY JUDGMENT GRANTED.

{¶9} RELATOR'S MOTION FOR DEFAULT OR SUMMARY JUDGMENT IS DENIED.

{¶10} WRIT DENIED.

{¶11} COSTS TO RELATOR.

{¶12} IT IS SO ORDERED.

By Gwin, J.,

Edwards, P.J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

HON. PATRICIA A. DELANEY

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