

COURT OF APPEALS  
RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO EX REL.,  
JULIUS NESBITT

Relator

-vs-

OHIO DEPARTMENT OF  
REHABILITATION AND CORRECTION

Respondent

JUDGES:

Hon. William B. Hoffman, P.J.  
Hon. Sheila G. Farmer, J.  
Hon. Patricia A. Delaney, J.

Case No. 2009CA00136

OPINION

CHARACTER OF PROCEEDING:

Writ of Mandamus

JUDGMENT:

Dismissed

DATE OF JUDGMENT ENTRY:

March 4, 2010

APPEARANCES:

For Relator

JULIUS NESBITT  
STATE OF OHIO EX REL.  
Mansfield Correctional Institution  
#340703  
P.O. Box 788  
Mansfield, Ohio 44901-0788

For Respondent

RICHARD CORDRAY  
Ohio Attorney General  
  
LAWRENCE H. BABICH  
Assistant Attorney General  
150 E. Gay St., 16<sup>th</sup> Floor  
Columbus, Ohio 43215-6001

*Hoffman, P.J.*

{¶1} Relator, Julius Nesbitt, has filed a Complaint in Mandamus requesting a writ issue ordering Respondent, the Ohio Department of Rehabilitation and Correction, to credit Relator for time spent in educational programs, vocational training, and employment in prison industries. Respondent has filed an Answer as well as a Motion for Summary Judgment. Relator also filed a Response to Respondent's Answer.

{¶2} 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.

{¶3} In his motion for summary judgment, Respondent raises two issues. First, Respondent argues the instant Complaint is barred by the doctrine of res judicata. Second, Respondent argues Relator cannot demonstrate a clear legal duty on behalf of Respondent to credit Relator's sentence.

{¶4} In support of his first argument, Respondent draws our attention to the affidavit of civil filings completed by Relator. A review of the complaint reveals Relator has failed to comply with R.C. 2969.25, which requires Relator to attach an affidavit to the complaint for a writ of mandamus describing every civil action or appeal filed within the previous five years in any state or federal court. Relator did not disclose the action brought in the Tenth District Court of Appeals.

{¶5} The failure to comply with R.C. 2969.25 requires the dismissal of this complaint for a writ of mandamus. *State ex rel. Zanders v. Ohio Parole Bd.*, 82 Ohio

St.3d 421, 1998-Ohio-218, 696 N.E.2d 594; *Alford v. Winters*, 80 Ohio St.3d 285, 1997-Ohio-117, 685 N.E.2d 1242. Respondent argues Relator's failure to include the Tenth District action warrants dismissal. We agree.

{¶16} Respondent also urges us to find this cause if action is barred by the doctrine of res judicata because of the judgment entered in the Tenth District case.

{¶17} The Supreme Court has explained, "In Ohio, "[t]he doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel." *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6. "Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action." *Id.* The previous action is conclusive for all claims that were or that could have been litigated in the first action. See *Holzemer v. Urbanski* (1999), 86 Ohio St.3d 129, 133, 712 N.E.2d 713." *State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.*, 121 Ohio St.3d 526, 530, 905 N.E.2d 1210, 1215 - 1216 (Ohio, 2009).

{¶18} Relator's action in the Tenth District Court of Appeals was an "Original Action in Mandamus . . . Compelling A.P.A. to Comply with Crediting Relator Earned Good Days for Productive Participation in Institutional Programs Pursuant to O.R.C. 2967.193." On April 20, 2009, the Tenth District dismissed Relator's action for failure to comply with Tenth District Loc.R. 12(B). The entry of dismissal did not state the entry was without prejudice.

{¶19} "Under the doctrine of res judicata, '[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the

transaction or occurrence that was the subject matter of the previous action.’ ” *State ex rel. Denton v. Bedinghaus*, 98 Ohio St.3d 298, 2003-Ohio-861, 784 N.E.2d 99, ¶ 14, quoting *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 653 N.E.2d 226, syllabus.” *State ex rel. Coles v. Granville*, 116 Ohio St.3d 231, 238, 877 N.E.2d 968, 975 (Ohio,2007).

**{¶10}** We must determine whether the dismissal entry in the Tenth District case was a judgment on the merits and whether this action is based upon a claim which was the subject matter of the previous action.

**{¶11}** Civ.R. 41(B) governing involuntary dismissal, states, in relevant part, that “[a] dismissal under division (B) of this rule \* \* \* operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies.” Civ. R. 41(B)(3). Division (B)(1) provides, “(1) *Failure to prosecute*. Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff’s counsel, dismiss an action or claim.” The trial court’s entry of dismissal states notice was given to Relator he was required to comply with Loc.R. 12(B). Relator failed to comply with the order, therefore, the case was dismissed. Therefore, the dismissal does operate as an adjudication on the merits since the entry did not state otherwise.

**{¶12}** The subject matter of both the Tenth District case and the instant case involve exactly the same claim and requested relief. Because the Tenth District case is a valid judgment on the merits relative to the same subject matter, the instant case is barred by *res judicata*.

{¶13} Respondent's next argues he is not under a clear legal duty to credit Relator because the statute cited by Relator, R.C. 2967.193, is inapplicable to Relator. Further, Respondent relied on our prior ruling wherein we observed R.C. 2967.193 appears to be subjective, therefore, there is no clear legal duty.

{¶14} Because our decision relative to the issue of res judicata and the defect in Relator's Complaint are dispositive of this case, we need not address Respondent's other arguments.

{¶15} For these reasons, the instant cause is dismissed.

{¶16} CAUSE DISMISSED.

{¶17} COSTS TO RELATOR.

{¶18} IT IS SO ORDERED.

By: Hoffman, P.J.

Farmer, J. and

Delaney, J. concur

s/ William B. Hoffman  
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer  
HON. SHEILA G. FARMER

s/ Patricia A. Delaney  
HON. PATRICIA A. DELANEY

