

C.S. §761; Pa. R.A.P. 1502.¹ The DOC filed preliminary objections in the nature of a demurrer on October 16, 2007. This Court then ordered the DOC to file a brief in support of its preliminary objections. We sustain the preliminary objections and dismiss the petition for review for failure to state a valid cause of action.

In the petition, McDaniels contends that the DOC separated his three concurrently running sentences when it aggregated McDaniels' sentences after his fourth sentence was ordered to run consecutively with his other sentences. McDaniels states that separating the three concurrently running sentences violates the trial court's sentencing order and deviates from what was intended by the trial court. He requests an order compelling the DOC to re-attach the three concurrent sentences he is serving and thus, change his maximum release date from June 16, 2011 to October 29, 2010.

McDaniels is serving four sentences, eight to sixteen years for robbery, eight to sixteen years for aggravated assault, eight to sixteen years for rape, and three and one-half to seven years after being re-sentenced for violating his probation. The robbery, aggravated assault and rape sentences were imposed by the trial court on June 16, 1988 and ordered to run concurrently. The trial court awarded the robbery sentence "credit for time served" and the rape sentence credit from "10-29-87 to present." The parties agree that the rape charge was not related to his aggravated assault and robbery charges.

¹ McDaniels' petition is treated as an action in mandamus as he is asking our Court to compel the DOC to perform a ministerial act. See McGill v. Pennsylvania Department of Health, Office of Drug and Alcohol Programs, 758 A.2d 268 (Pa. Cmwlth. 2000).

On July 5, 1998, the trial court revoked McDaniels' probation, re-sentenced him to serve three and one-half to seven years and did not award him any credit. This re-sentence was ordered to run consecutively to any sentence McDaniels was serving. The DOC then aggregated McDaniels' four sentences, giving him a total sentence of eleven and one-half to twenty-three years.

On September 14, 2007, McDaniels filed a petition for writ of mandamus with our court, requesting our court order the DOC to re-attach the three concurrent sentences he is serving, as he believes he was entitled to pre-commitment credit on all three of the sentences that ran concurrently. The DOC filed preliminary objections to McDaniels' petition. The DOC contends that McDaniels is not entitled to have all three of his sentences credited with the same pre-commitment credit.

In our original jurisdiction, an action in mandamus must define the issues, and every act or performance essential to that act must be set forth in the complaint. See Pa. R.C.P. No. 1019. Mandamus is not proper to establish legal rights, but is only appropriately used to enforce those rights which have already been established. Waters v. Department of Corrections, 509 A.2d 430 (Pa. Cmwlth. 1986). A writ of mandamus may be issued, only where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and the lack of any other appropriate and adequate remedy. Delaware River Port Authority v. Thornburgh, 508 Pa. 11, 493 A.2d 1351 (1985).

In determining preliminary objections, all well-pled facts which are material and relevant are deemed to be true. Hawks by Hawks v. Livermore, 629 A.2d 270 (Pa. Cmwlth. 1993); Erie County League of Women Voters v. Department of Environmental Resources, Bureau of State Parks, 525 A.2d 1290

(Pa. Cmwlth. 1987). In determining whether to sustain a demurrer, the Court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion. Griffin v. Chronister, 616 A.2d 1070 (Pa. Cmwlth. 1992). Moreover, a complaint which consists of merely argumentative conclusions, as opposed to properly pled statements of fact, cannot withstand a demurrer for failure to set forth a claim for which relief can be granted. See Price v. Zoning Hearing Board of Hanover Township, 455 A.2d 1267 (Pa. Cmwlth. 1983).

The DOC in its brief in support of the preliminary objections argues that McDaniels has failed to show that he has a clear right to relief. We agree.

The Sentencing Code, 42 Pa. C.S. §§9701-9799.7, provides in pertinent part as follows:

§9760. Credit for time served

After reviewing the information submitted under section 9737 (relating to report of outstanding charges and sentences) the court shall give credit as follows:

(1) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. Credit shall include credit for time spent in custody prior to trial, during trial, pending sentence, and pending the resolution of an appeal.

(4) If the defendant is arrested on one charge and later prosecuted on another charge growing out of an act or acts that occurred prior to his arrest, credit against the maximum term and any minimum term of any sentence resulting from such prosecution shall be given for all

time spent in custody under the former charge that has not been credited against another sentence.

42 Pa. C.S. §9760(1) and (4).

Section 9760(4) states that credit for time served on a sentence may be granted only when it has not already been credited toward another sentence. Taglienti v. Department of Corrections, 806 A.2d 988 (Pa. Cmwlth. 2002). Section 9760 does not allow a defendant to receive credit against more than one sentence imposed for multiple convictions of separate and unrelated charges and neither does any other provision of the Code.

Our Court has consistently held that a defendant is not entitled to duplicate credit for time served on concurrent sentences of unrelated charges. In Bright v. Department of Corrections, 831 A.2d 775 (Pa. Cmwlth. 2003), our Court found as follows:

Bright was sentenced to four to ten year concurrent prison sentences on ten convictions of separate, unrelated charges as in Merigris. Therefore, he is not entitled to receive duplicate credit. In calculating Bright's maximum term expiration date, the Department gave Bright credit for the time served prior to sentencing on one sentence. After such credit was given to Bright, his maximum term expiration date of October 21, 2003 remained the same.

Id. at 779.

The Superior Court in Commonwealth v. Merigris, 681 A.2d 194 (Pa. Super. 1996), stated that “[t]he absurdity of appellant’s case is clear. Following his reasoning appellant would receive a windfall in sentencing for a completely unrelated crime. This court does not deal in ‘volume discounts.’ The operative rule...is that a defendant should receive credit only once for time served before

sentencing.” Id. 681 A.2d at 194 (quoting Commonwealth v. Hollawell, 604 A.2d 723 (Pa. Super. 1992)).

McDaniels was not entitled to have each of the three concurrent sentences credited with the same pre-commitment credit time, as one of these sentences was not related to the other two sentences.

Accordingly, the preliminary objections filed by the DOC are sustained and the petition for review filed by McDaniels is dismissed.

JIM FLAHERTY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Aubrey O. McDaniels,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 447 M.D. 2007
	:	
Department of Corrections, Paul J.	:	
Stowitzky, Superintendent, and	:	
Jacqueline S. Marquardt, Records	:	
Room Supervisor of the State	:	
Regional Correctional Facility at	:	
Mercer, Pennsylvania,	:	
Respondents	:	

ORDER

AND NOW, this 17th day of March, 2008, the preliminary objections filed by the Department of Corrections are sustained and the petition for review filed by Aubrey O. McDaniels is hereby dismissed. Also, Aubrey O. McDaniels' motion for emergency relief is dismissed as moot.

JIM FLAHERTY, Senior Judge