

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, EX REL.,
GREGORY M. MALENDIA,

:

Relator,

:

No. 108437

v.

:

DOMINIC J. COLETTA, JUDGE,

:

Respondent.

:

JOURNAL ENTRY AND OPINION

JUDGMENT: WRITS DENIED

DATED: August 20, 2019

Writs of Mandamus and Procedendo
Motion No. 529363
Order No. 530336

Appearances:

Gregory M. Malenda, *pro se*.

Paul T. Murphy and Raymond J. Schmidlin, Jr., *for
respondent*.

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Relator, Gregory M. Malenda, claims entitlement to writs of mandamus and procedendo¹ because respondent, Judge Dominic J. Coletta, has denied his “motion[s] for sentence to be ran concurrent and a warrant recall for failure of the trial court to strictly and substantially comply with O.R.C. 2929.41, 2941.40, and 2941.41.” He asks this court to order respondent to enter concurrent sentences imposed between various criminal cases and recall a warrant. Malenda’s complaint is fatally and procedurally defective and fails to set forth a claim that can be addressed in mandamus or procedendo. And, even if a valid claim was advanced, there is an adequate remedy at law. Therefore, the request for writs of mandamus and procedendo are denied.

I. Factual and Procedural History

{¶ 2} There are no factual allegations in the complaint to explain the history of the underlying criminal case that is the subject of this action. However, the attached docket of a criminal case against Malenda in the Lyndhurst Municipal Court indicates that he was convicted of falsification, a first-degree misdemeanor. *Lyndhurst v. Malenda*, Lyndhurst M.C. No. 15-CRB-00830. The docket shows that on April 18, 2016, Malenda was sentenced to a suspended jail term of 180 days. On

¹The caption of the complaint filed in this case indicates that writs of mandamus and prohibition are sought, but the body of the complaint seeks mandamus and procedendo.

August 26, 2016, a notice of probation violation was entered on the docket and a warrant was issued. This warrant was subsequently recalled, but this process repeated itself over the next two years.

{¶ 3} On February 11, 2019, and March 5, 2019, Malenda filed “motions to recall warrant and/or license forfeiture.” Respondent denied both motions. On March 18, 2019, Malenda filed a “motion for sentence to run concurrent.” That motion was also denied by respondent.

{¶ 4} Then, on April 15, 2019, Malenda filed the instant complaint. Respondent filed an answer on May 15, 2019, followed by a motion for summary judgment on June 13, 2019. Relator did not file a brief in opposition to summary judgment.

II. Law and Analysis

A. Standards for Mandamus and Procedendo

{¶ 5} “To be entitled to a writ of mandamus, the relator must establish, by clear and convincing evidence, (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of the respondent to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law.” *State ex rel. Zander v. Judge of Summit Cty. Common Pleas Court*, Slip Opinion No. 2019-Ohio-1704, ¶ 4, citing *State ex rel. Love v. O'Donnell*, 150 Ohio St.3d 378, 2017-Ohio-5659, 81 N.E.3d 1250, ¶ 3.

{¶ 6} Similarly,

[a] writ of procedendo is appropriate when a court has either “refused to enter judgment or has unnecessarily delayed proceeding to judgment.” *State ex rel. Poulton v. Cottrill*, 147 Ohio St.3d 402, 2016-Ohio-5789, 66 N.E.3d 716, ¶ 2. Thus, the writ will issue only upon a showing of a “clear legal right to require the trial court to proceed, a clear legal duty on the part of the trial court to proceed, and the lack of an adequate remedy in the ordinary course of the law.” *State ex rel. Ward v. Reed*, 141 Ohio St.3d 50, 2014-Ohio-4512, 21 N.E.3d 303, ¶ 9.

State ex rel. Roberts v. Marsh, Slip Opinion No. 2019-Ohio-1569, ¶ 12.

{¶ 7} The matter is before this court on respondent’s motion for summary judgment.

“Summary judgment is appropriate if (1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made”

State ex rel. Gilmour Realty, Inc. v. Mayfield Hts., 122 Ohio St.3d 260, 2009-Ohio-2871, 910 N.E.2d 455, ¶ 14, quoting *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 2005-Ohio-2163, 826 N.E.2d 832, ¶ 9.

B. Procedural Deficiencies

{¶ 8} Malenda’s complaint fails to comply with the procedural requirements set forth in R.C. 2969.25(A) and (C)(1). This statute provides, in pertinent part,

(A) At the time that an inmate commences a civil action or appeal against a government entity or employee, the inmate shall file with the court 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.

* * *

(C) If an inmate who files a civil action or appeal against a government entity or employee seeks a waiver of the prepayment of the full filing fees assessed by the court in which the action or appeal is filed, the inmate shall file with the complaint or notice of appeal an affidavit that the inmate is seeking a waiver of the prepayment of the court's full filing fees and an affidavit of indigency. The affidavit of waiver and the affidavit of indigency shall contain all of the following:

(1) A statement that sets forth the balance in the inmate account of the inmate for each of the preceding six months, as certified by the institutional cashier[.]

{¶ 9} Malenda did not include the affidavit described in R.C. 2969.25(A) detailing his prior actions filed against government entities or employees. Failure to comply with this provision is sufficient reason to deny the requested relief. *State ex rel. Swanson v. Ohio Dept. of Rehab. & Corr.*, Slip Opinion No. 2019-Ohio-1271, ¶ 7.

{¶ 10} Further, Malenda did include an affidavit of indigency with his complaint, but he did not attach a statement from an institutional cashier documenting the balance of his inmate account for the previous six months. This is required. *State ex rel. Powe v. Lanzinger*, Slip Opinion No. 2019-Ohio-954, ¶ 7. Lack of compliance with this requirement warrants dismissal. *Id.* at ¶ 5.

{¶ 11} These procedural errors are sufficient grounds to grant respondent's motion for summary judgment.

C. Mandamus and Procedendo

{¶ 12} Regardless of the procedural deficiencies, Malenda's complaint also fails on the merits. Malenda claims he is entitled to writs of mandamus and

procedendo because respondent has failed to impose concurrent, rather than consecutive sentences.

{¶ 13} In his complaint, Malenda requests the following relief:

Based on the foregoing facts the defendant prays that his issuance of writ of mandamus and writ of procedendo is granted and presidantly [sic] raised. The court needs to hold that pursuant to [*State v.*] *Foster*, [109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470,] [the sentence] was based on unconstitutional judicial fact-finding under *Blakely* [*v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)]. As Ohio R.C. 2929.19(B)(2) was severed from the sentencing statute.

Complaint at 5.

{¶ 14} The body of the complaint asks this court to compel respondent to release “him due to concurrent sentences[.]” However, respondent has not imposed a prison sentence on Malenda, let alone consecutive sentences. From the sparse record provided by Malenda, it does not appear that a prison sentence was imposed in the municipal court case before respondent. A 180-day jail term was imposed, but all of that term was suspended, and the docket does not indicate that this suspended sentence was ever ordered into execution. There is no sentence in the municipal court case that could be ordered to be served concurrently. Therefore, there can be no impermissible judicial fact-finding regarding consecutive sentences, even if that claim survived the legislature’s revival of excised portions of R.C. 2929.14 as recognized by the Ohio Supreme Court in *State v. Sergeant*, 148 Ohio St.3d 94, 2016-Ohio-2696, 69 N.E.3d 627, ¶ 35-36.

{¶ 15} Further, even if respondent did impose an invalid sentence, a direct appeal from the sentence is the proper vehicle to raise a claim that a court

erroneously imposed consecutive sentences. *State ex rel. Culgan v. Kimbler*, 132 Ohio St.3d 480, 2012-Ohio-3310, 974 N.E.2d 88. Malenda had an adequate remedy at law to raise these claims. Therefore, “he cannot now raise them in a mandamus action.” *State ex rel. Miller v. Bower*, Slip Opinion No. 2019-Ohio-1623, ¶ 13, citing *State ex rel. Sanford v. Bur. of Sentence Computation*, 10th Dist. Franklin No. 16AP-276, 2016-Ohio-7872, ¶ 6-7 (affirming dismissal of mandamus action because relator had an adequate remedy at law by way of appealing the consecutive sentences). A writ may not be used as a substitute for an appeal or as a means of gaining a second chance for appellate review. *State ex rel. Peoples v. Johnson*, 152 Ohio St.3d 418, 2017-Ohio-9140, 97 N.E.3d 426, ¶ 11, citing *State ex rel. LTV Steel Co. v. Gwin*, 64 Ohio St.3d 245, 249, 594 N.E.2d 616 (1992).

{¶ 16} Malenda also seeks to require respondent to recall a warrant. Malenda filed motions to recall a warrant, and respondent timely denied those motions. Respondent has not refused to enter judgment or unnecessarily delayed in entering judgment, and Malenda has not shown that he has a right to the requested relief. Malenda has not alleged that respondent has a duty to withdraw the warrant.² Therefore, mandamus and procedendo are not appropriate in this case. *See Powell v. Houser*, 7th Dist. Mahoning No. 07-MA-14, 2007-Ohio-2866, ¶ 21-23.

² If Malenda is actually seeking a writ of prohibition, respondent has jurisdiction to conduct a community control violation hearing, of which the issuance of a warrant for community control violations is a part. *See Grundstein v. Carroll*, 8th Dist. Cuyahoga No. 83885, 2004-Ohio-2346.

{¶ 17} Respondent's motion for summary judgment is granted. Malenda's request for writs of mandamus and procedendo are denied. Relator to pay costs. This court directs the clerk of courts to serve all parties notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

{¶ 18} Writs denied.

FRANK D. CELEBREZZE, JR., JUDGE

**SEAN C. GALLAGHER, P.J., and
MICHELLE J. SHEEHAN, J., CONCUR**