

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Kevin Hughley,	:	
Relator,	:	
v.	:	No. 09AP-244
The Ohio Department of	:	(REGULAR CALENDAR)
Rehabilitation and Correction,	:	
Respondent.	:	

D E C I S I O N

Rendered on April 8, 2010

Kevin Hughley, pro se.

Richard Cordray, Attorney General, and *Lisa M. Eschbacher*,
for respondent.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Kevin Hughley ("relator"), has filed an original action requesting this court to issue a writ of mandamus ordering respondent, Ohio Department of Rehabilitation and Correction ("DRC"), to correct its offender identification website to reflect the actual identity of his offenses, and he filed a motion to amend his complaint

to request a writ ordering DRC to remove from its website information indicating that he was convicted of an unlawful car transfer offense under R.C. 4505.19. DRC filed a motion to dismiss the original complaint and opposed the motion to amend.

{¶2} This court referred the matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate recommended that this court (1) grant DRC's motion to dismiss because relator conceded that the website has been corrected to accurately reflect the offenses subject to his original complaint, and (2) deny relator's motion to amend his complaint. Relator objected, and this court returned the matter to the magistrate for further consideration of his motion to amend the complaint; this court did not reject the magistrate's decision to dismiss the original complaint, however. The magistrate issued another decision, which includes findings of fact and conclusions of law and is appended to this decision. She surmised that this court wanted to allow relator to amend his complaint, but she recommended that the amended complaint be sua sponte dismissed. Relator filed objections to the magistrate's decision, pursuant to Civ.R. 53(D)(3)(b), and he filed a motion to vacate the decision pursuant to App.R. 15(B). We overrule the objections and deny the motion to vacate for the following reasons.

{¶3} In order to be entitled to a writ of mandamus, a relator has the burden of demonstrating the following: (1) he has a clear legal right to the relief requested; (2) the respondent is under a clear legal duty to perform the act requested; and (3) the relator has no plain and adequate remedy at law. *State ex rel. Fain v. Summit Cty. Adult Probation Dept.*, 71 Ohio St.3d 658, 1995-Ohio-149. We examine these factors in light of the magistrate's decision to dismiss relator's amended complaint, which we construe

as under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted. Civ.R. 12(B)(6) tests whether a complaint is sufficient. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992-Ohio-73. It must appear beyond a doubt from the complaint that a party can prove no set of facts entitling him to recover. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus. The court shall not rely on allegations or evidence outside the complaint. *State ex rel. Fuqua v. Alexander*, 79 Ohio St.3d 206, 207, 1997-Ohio-169. And, the court must presume that all factual allegations in the complaint are true. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. The court need not, however, accept as true unsupported legal conclusions in the complaint. *Morrow v. Reminger & Reminger Co., L.P.A.*, 183 Ohio App.3d 40, 2009-Ohio-2665, ¶7.

{¶4} Because the magistrate considered relator's motion to amend his complaint as the amended complaint itself, we shall do likewise. In the amended complaint, relator claimed that DRC lacked authority to indicate on its offender identification website that he committed an unlawful car transfer offense because his nine-month sentence for the offense should have been served in a county jail or workhouse instead of in state prison pursuant to R.C. 4505.19(B) (providing that violators shall be "imprisoned in the county jail or workhouse not less than six months nor more than one year, or both, or in a state correctional institution not less than one year nor more than five years"). The magistrate recognized that, in another mandamus action, this court declined to disturb this sentence. See *State ex rel. Hughley v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-586, 2009-Ohio-6276, ¶1-4 (denying relator's request for a writ of mandamus ordering DRC to terminate the sentence on the

R.C. 4505.19 offense because DRC "lacks the authority to change" the sentence). She recognized that other courts have also declined to provide relator relief from this sentence. See *State v. Hughley*, 8th Dist. No. 90323, 2009-Ohio-3274, ¶¶6-8 (denying relator's App.R. 26(B) application to reopen his appeal on the sentence for the R.C. 4505.19 offense because "[a]lthough the sentence does appear to be improper, this court is not convinced that appellate counsel was deficient for not raising it"). See also *Hughley v. Duffey*, 5th Dist. No. 09-CA-0043, 2009-Ohio-6085, ¶¶2-5 (concluding that relator's petition for a writ of habeas corpus was not the proper vehicle to challenge his sentence for the R.C. 4505.19 offense). Relator contends that these cases are inapposite because they did not reach the merits of the validity of the sentence, but declined to correct it for procedural reasons instead. The cases are relevant, however, because they did not disturb the prison sentence and left intact DRC's custody over him during the sentence. And, this court cannot now review the validity of the sentence because a direct appeal was the proper vehicle for relator to challenge it, and mandamus is not a substitute for a direct appeal. See *State ex rel. Jones v. O'Neill*, 10th Dist. No. 01AP-1356, 2002-Ohio-2877, ¶5; *State ex rel. Rutan v. Bessey*, 10th Dist. No. 07AP-316, 2007-Ohio-6856, ¶7. In the final analysis, relator's sentence for the R.C. 4505.19 offense remains undisturbed, and his arguments against the sentence cannot now serve as a basis for a writ ordering DRC to remove from its website information that he committed the offense.

{¶5} Next, relator argues that DRC was required to remove the R.C. 4505.19 information from its website because it incorrectly described the offense as one for altering title. R.C. 4505.19 prohibits various crimes related to car transfers, including

altering title. Relator alleged in his amended complaint that altering title was not characteristic of his particular offense, but this is a generic assertion lacking the necessary operative facts required in a complaint. See *Canady v. Rekau & Rekau, Inc.*, 10th Dist. No. 09AP-32, 2009-Ohio-4974, ¶20 (recognizing pleading requirements that a complaint allege operative facts necessary to give fair notice of the nature of the action). A plaintiff fails to state a claim upon which relief can be granted when he does not plead the necessary operative facts. *Johnson v. Ferguson-Ramos*, 10th Dist. No. 04AP-1180, 2005-Ohio-3280, ¶49. Lastly, relator objects to the magistrate deciding that he "is no longer in the custody of [DRC] so his claim that he should not be incarcerated in a state facility has been rendered moot." We need not address this issue, however, given our conclusion that we lack authority to review the validity of his sentence in this mandamus action.

{¶6} In conclusion, we deny relator's App.R. 15(B) motion to vacate the magistrate's decision, and, having conducted an independent review of the record, we overrule his objections to that decision. Consequently, we adopt the decision as our own, including the findings of fact and conclusions of law contained it, and dismiss relator's mandamus action.

*Motion to vacate denied.
Objections overruled, action dismissed.*

SADLER and CONNOR, JJ., concur.

A P P E N D I X
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Kevin Hughley,	:	
Relator,	:	
v.	:	No. 09AP-244
The Ohio Department of Corrections and Rehabilitation,	:	(REGULAR CALENDAR)
Respondent.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on December 4, 2009

Kevin Hughley, pro se.

Richard Cordray, Attorney General, and Lisa M. Eschbacher,
for respondent.

IN MANDAMUS
ON SUA SPONTE DISMISSAL

{¶7} Relator, Kevin Hughley, commenced this original action requesting a writ of mandamus ordering respondent, Ohio Department of Rehabilitation and Correction ("ODRC"), to correct the information provided on ODRC's website so that it properly indicates the actual offenses for which relator had been convicted. Relator also filed a

motion to amend his complaint arguing that ODRC lacked authority to detain him because his nine-month sentence for violating R.C. 4505.19 can only be served in a jail or workhouse.

Findings of Fact:

{¶8} 1. Relator was an inmate incarcerated at Southeastern Correctional Institution.

{¶9} 2. Relator has since been released from custody and is no longer incarcerated.

{¶10} 3. In March 2009, relator filed this mandamus action requesting that ODRC be ordered to correct the information provided on ODRC's website to reflect the actual offenses for which he had been convicted. Relator asserted that ODRC failed to remove from its website certain convictions which had been reversed on appeal.

{¶11} 4. In April 2009, ODRC filed a motion to dismiss which the magistrate converted to a motion for summary judgment. ODRC attached certified records from its website indicating that the convictions which relator indicated should be removed had, in fact, been removed.

{¶12} 5. In response, relator filed a memorandum contra wherein he conceded that ODRC had removed in its entirety his convictions of tampering with records and that issue was moot. However, relator claimed that other convictions should also be removed.

{¶13} 6. This magistrate denied ODRC's motion for summary judgment because relator had not fewer than five underlying criminal cases all involving similar charges of forgery, uttering, tampering with records, insurance fraud, and theft. Because it

appeared that relator remained convicted on an unknown number of counts, including forgery, uttering, and tampering with records, the magistrate concluded that genuine issues as to material facts still remained.

{¶14} 7. In June 2009, relator filed a motion for leave to amend his complaint asserting that ODRC was "without authorization to detain relator on this offense pursuant to R/C 4505.19(B) penalty stage since a 9 month sentence can't be served in respondent's venue thus this case 481899 shouldn't be posted on respondent website. This is a huge violation of the public record act." (Sic passim.)

{¶15} 8. In June 2009, ODRC filed a second motion to dismiss.

{¶16} 9. In a magistrate's decision rendered June 12, 2009, the magistrate denied relator's motion to amend his complaint and, inasmuch as relator had conceded that ODRC had provided him the relief which he sought, the magistrate concluded that ODRC's motion to dismiss should be granted.

{¶17} 10. Relator filed objections with this court asserting that the magistrate should have granted his motion to amend his complaint.

{¶18} 11. In a memorandum decision rendered October 22, 2009, this court concluded that the magistrate should have permitted relator to amend his complaint and, accordingly, returned the matter to the magistrate for consideration.

{¶19} 12. In the interim, several events have occurred which are relative to this matter: (a) Relator filed another mandamus action in this court again arguing that, pursuant to R.C. 4505.19(B), his nine-month sentence could only be served in the county jail or workhouse. This is the same issue raised in his amended complaint. (b) In a magistrate's decision rendered August 17, 2009, the magistrate pointed out that

relator had already raised this issue in other courts and those courts had rejected his arguments. (c) Specifically, in *State v. Hughley*, 8th Dist. No. 90323, 2009-Ohio-3274, ¶6-7, relator attempted to reopen the court's judgment pursuant to App.R. 26(B). According to the court's decision, one of the issue raised by relator is the same issues he raises here:

Hughley's first contention is that his appellate counsel should have argued that his sentence for Case Three is improper. R.C. 4505.19, Title Offenses, prohibits a variety of improprieties relating to the transfer and sale of motor vehicles. The trial court found Hughley guilty of unlawfully and knowingly obtaining goods, services or money by means of an invalid, fictitious, forged, counterfeit, stolen or unlawfully obtained bill of sale of a motor vehicle. The trial court sentenced him to nine months at the Lorain Correctional Institution.

* * * Accordingly, Hughley submits that a nine-month sentence in a state correctional institution is contrary to the statute and is a void, improper sentence, which this court would have reversed and remanded for resentencing, if his appellate counsel had argued it.

(d) In rejecting relator's argument, the court noted that, had counsel raised that issue, the trial court could just as easily have added three months to his sentence so that his 9-month sentence would have become a 12-month sentence. (e) The magistrate recommended that ODRC's motion to dismiss should be granted and, in a decision rendered December 1, 2009, this court agreed. (f) On November 16, 2009, the Fifth District Court of Appeals denied relator's petition for a writ of habeas corpus which he pursued on the same grounds he pursues here. *Hughley v. Duffey*, 5th Dist. No. 09-CA-0043, 2009-Ohio-6085, ¶4-5. The Fifth District Court of Appeals noted that relator had raised this issue previously and that it had been denied:

Petitioner raised this exact issue in *Hughley v. Southeastern Correctional Inst.* 2009 WL 2986237, 3 (Ohio App. 5 Dist.) wherein we held,

"Because the trial court had subject matter jurisdiction, the sentence imposed is voidable rather than void. Only a void sentence may be raised by way of a Petition for Writ of Habeas Corpus." Additionally, Petitioner raised this exact issue in the Supreme Court in Case Number 09-1350. The Supreme Court also declined to issue the requested writ.

(g) Relator is no longer incarcerated.

Conclusions of Law:

{¶20} For the reasons that follow, it is this magistrate's decision that this court should sua sponte dismiss relator's action.

{¶21} First, as indicated in the findings of fact, this issue has already been addressed on numerous occasions and has repeatedly been denied. Second, relator is no longer in the custody of ODRC so his claim that he should not be incarcerated in a state facility has been rendered moot.

{¶22} For the above reasons, this court should sua sponte dismiss relator's mandamus action.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).