

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

[State of Ohio ex rel. Darrick Bangs,	:	
Relator,	:	
v.	:	No. 11AP-686
Franklin County Court of Common Pleas	:	(REGULAR CALENDAR)
and Judge Stephen L. McIntosh,	:	
Respondents.]	:	

D E C I S I O N

Rendered on January 24, 2012

Darrick Bangs, pro se.

Ron O'Brien, Prosecuting Attorney, for respondent.

IN MANDAMUS/PROCEDENDO
ON SUA SPONTE DISMISSAL

SADLER, J.

{¶1} Relator, Darrick Bangs, an inmate incarcerated at Mansfield Correctional Institution, commenced this original action requesting this court to issue a writ of mandamus and/or procedendo ordering respondent, Judge Stephen L. McIntosh of the Franklin County Court of Common Pleas, to rule on his motion for re-sentencing.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate determined that at the

time relator filed his complaint that he failed to file an affidavit of prior civil actions as required by R.C. 2969.25(A) and failed to attach a certified copy of the cashier's statement as required by R.C. 2969.25(C). As compliance with the provisions of R.C. 2969.25 is mandatory, the magistrate recommended this court sua sponte dismiss the complaint.

{¶3} No objections have been filed to the magistrate's decision.

{¶4} Having conducted an independent review of the record in this matter and finding no error of law or other defect in the magistrate's decision, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law therein. In accordance with the magistrate's decision, relator's complaint/petition for a writ of mandamus and/or procedendo is sua sponte dismissed.

Petition for writ of mandamus/procedendo dismissed.

BRYANT and CONNOR, JJ., concur.

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and Judge Stephen L. McIntosh,	:	
Respondents.]	:	

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

Rendered on August 29, 2011

Darrick Bangs, pro se.

Ron O'Brien, Prosecuting Attorney, for respondent.

IN MANDAMUS/PROCEDENDO
 ON SUA SPONTE DISMISSAL

{¶5} Relator, Darrick Bangs, has filed this original action requesting that this court issue a writ of mandamus and/or procedendo to order respondent, Judge Stephen L. McIntosh of the Franklin County Court of Common Pleas, to rule on his motion for re-sentencing.

Findings of Fact:

{¶6} 1. Relator is an inmate currently incarcerated at Mansfield Correctional Institution.

{¶7} 2. On August 15, 2011, relator filed a "complaint/petition for mandamus and/or procedendo" ("complaint") asking this court to order respondent to rule on his motion for re-sentencing filed December 8, 2010.

{¶8} 3. At the time relator filed his complaint, he did not file the affidavit of prior civil actions as required by R.C. 2969.25(A), and although he did file an affidavit of indigency, he failed to attach a certified copy of the cashier's statement as required by R.C. 2969.25(C).

Conclusions of Law:

{¶9} It is the magistrate's decision that this court sua sponte dismiss this action for reasons explained below.

{¶10} Procedendo is an order from a court of superior jurisdiction to proceed to judgment. *State ex rel. Sherrills v. Cuyahoga Cty. Court of Common Pleas* (1995), 72 Ohio St.3d 461, 462. The writ does not in any way attempt to control the inferior court as to what that judgment might be. *Id.* A writ of procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment. *State ex rel. Miley v. Parrott* (1996), 77 Ohio St.3d 64, 65.

{¶11} R.C. 2969.25(A) requires an inmate to file, at the time he commences a civil action against a governmental entity or employee, an affidavit listing each civil action or

appeal of a civil action that he filed in the past five years, providing specific information regarding each civil action or appeal. In the present action, relator has not filed the required affidavit.

{¶12} In regard to filing fees, R.C. 2969.25(C) and 2969.22 distinguish between paying the full amount of filing fees upon filing (referred to as "prepayment" of fees) and paying the fees pursuant to periodic deductions from the inmate's account maintained by the prison.¹ Under R.C. 2969.25(C), an inmate who seeks waiver of prepayment on the grounds of indigency must file an affidavit that includes: (1) a statement of the amount in his inmate account for the preceding six months as certified by the institutional cashier; and (2) a statement of all other cash and things of value owned by the inmate. Relator has failed to do so.

{¶13} Compliance with the provisions of R.C. 2969.25 is mandatory and the failure to satisfy the statutory requirements is grounds for dismissal of the action. *State ex rel. Washington v. Ohio Adult Parole Auth.* (1999), 87 Ohio St.3d 258; *State ex rel. Zanders v. Ohio Parole Bd.* (1998), 82 Ohio St.3d 421; *State ex rel. Alford v. Winters* (1997), 80 Ohio St.3d 285. In *State ex rel. Wartenbe v. Ohio Adult Parole Auth.*, 10th Dist. No. 03AP-922, 2004-Ohio-3937, ¶13, this court stated:

Compliance with the provisions of R.C. 2969.25 is mandatory and failure to satisfy the statutory requirements is grounds for dismissal of this action. *State ex rel. Washington v. Ohio Adult Parole Auth.* (1999), 87 Ohio St.3d 258, 719 N.E.2d 544; *State ex rel. Zanders v. Ohio Parole Bd.* (1998),

¹Under the statute, when the inmate has submitted the requisite affidavit of indigency, the clerk charges the inmate's account for funds in excess of ten dollars. Following that payment, all income in the inmate's account (excluding the \$10) is forwarded to the clerk each month until the fees are paid.

82 Ohio St.3d 421, 696 N.E.2d 594; *State ex rel. Alford v. Winters* (1997), 80 Ohio St.3d 285, 685 N.E.2d 1242.

{¶14} On more than one occasion, the Supreme Court of Ohio has considered whether prisoners can cure their failure to meet the filing requirements by filing an amended complaint. In *Fuqua v. Williams*, 100 Ohio St.3d 211, 2003-Ohio-5533, ¶9, the Supreme Court of Ohio stated as follows:

Finally, Fuqua conceded the point by expressly requesting leave in the court of appeals to amend his petition with the affidavit required by R.C. 2969.25. And Fuqua's belated attempt to file the required affidavit does not excuse his noncompliance. See R.C. 2969.25(A), which requires that the affidavit be filed "[a]t the time that an inmate commences a civil action or appeal against a government entity or employee." (Emphasis added.)

See also *Hawkins v. S. Ohio Correctional Facility*, 102 Ohio St.3d 299, 2004-Ohio-2893, ¶5, wherein the court stated as follows:

Moreover, Hawkins's petition did not satisfy R.C. 2969.25(A). See *Fuqua v. Williams*, 100 Ohio St.3d 211, 2003-Ohio-5533, 797 N.E.2d 982, syllabus ("A habeas corpus action is a civil action and therefore the provisions of R.C. 2969.21 through 2969.27 are applicable to such action"). His belated attempts to file the required affidavit do not excuse his noncompliance. *Id.* at ¶9, citing R.C. 2969.25(A).

(Footnote omitted.)

{¶15} Further, this court has sua sponte dismissed complaints filed by other prisoners wherein the prisoners failed to comply with the requirements of R.C. 2969.25(A) and (C). See [*State ex rel.*] *Draper v. State of Ohio*, 10th Dist. No. 07AP-357, 2007-Ohio-5581 and *State ex rel. White v. Ohio Adult Parole Auth.* (May 3, 2011), 10th Dist. No. 10AP-1093 (memorandum decision).

{¶16} Based on the foregoing, it is this magistrate's decision that this court should sua sponte dismiss relator's complaint/petition for a writ of mandamus and/or procedendo.

/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).