

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

[State of Ohio ex rel. Matthew T. Johnson,	:	
Relator,	:	
	:	No. 14AP-616
v.	:	
	:	(REGULAR CALENDAR)
Ohio Department of Rehabilitation	:	
and Correction,	:	
	:	
Respondent.]	:	
	:	

D E C I S I O N

Rendered on June 11, 2015

Matthew T. Johnson, pro se.

Michael DeWine, Attorney General, and Caitlyn A. Nestleroth, for respondent.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} Relator, Matthew T. Johnson, commenced this original action requesting a writ of mandamus ordering respondent, Ohio Department of Rehabilitation and Correction ("ODRC"), to apply jail-time credit to both of his concurrent prison terms in accordance with *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, in order to reduce his total prison term.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who considered the action on its merits and issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate determined that *Fugate* did not compel the jail-time credit to be credited to both of relator's sentences and also determined that, because relator failed to appeal his sentences, the original action was barred by a plain and adequate remedy at law. Accordingly, the magistrate recommended that this court deny the requested writ of mandamus.

I. BACKGROUND

{¶ 3} None of the parties have filed objections to the magistrate's findings of fact, and following an independent review of the record, we adopt those findings as our own. In summary, on January 28, 2014, the trial court collectively sentenced relator on a 2013 case, in which relator pled guilty to a multitude of burglary and theft charges, as well as two community control violations stemming from criminal cases in 2010 and 2012. Relator ultimately received a 6-year sentence for the 2013 charges, and an 18-month sentence for the community control violations on the 2012 and 2010 charges. The trial court ordered that the "sentences imposed in [the 2013] case shall be served CONCURRENTLY with the sentences imposed in the [2012 and 2010 cases], for a total of Six (6) years." (Emphasis sic.) (Feb. 3, 2014 Journal Entry, 2.) The trial court also credited relator with 170 days of jail-time credit on the 2013 case and 472 days of jail-time credit on the 2010 and 2012 cases combined.

{¶ 4} ODRC applied 170 days of jail-time credit, plus several extra days for time spent awaiting transport, to relator's 6-year total sentence. Relator submitted a motion to order proper jail-time credit to the trial court. On July 11, 2014, the trial court denied the motion. Relator did not appeal the trial court's denial of the jail-time credit motion. Instead, on August 8, 2014, relator filed the instant mandamus action against ODRC. ODRC filed a motion to dismiss, and relator responded with a memorandum contra and request for summary judgment, to which ODRC filed a reply. The magistrate issued its decision on January 23, 2015 denying relator's request for a writ of mandamus.

II. OBJECTIONS

{¶ 5} Relator objects to the magistrate's decision in two respects. First, relator objects to the magistrate's conclusion that *Fugate* does not require the application of the 472 days of jail-time credit to both of his concurrent sentences. Second, relator objects to the magistrate's conclusion that his sentence was appealable, barring mandamus relief, when, in relator's opinion, ODRC's application of the sentence was at issue rather than the sentence itself.

III. DISCUSSION

{¶ 6} In order for a writ of mandamus to issue, the relator must demonstrate: (1) that he has a clear legal right to the relief prayed for, (2) that the respondent is under a clear legal duty to perform the act requested, and (3) that the relator has no plain and adequate remedy in the ordinary course of law. *State ex rel. Rankin v. Ohio Adult Parole Auth.*, 98 Ohio St.3d 476, 2003-Ohio-2061, ¶ 6.

A. First Objection

{¶ 7} Regarding his first objection, which challenges the magistrate's handling of *Fugate* as the source of his clear legal right to the jail-time credit, relator offers no support for his objection beyond reiterating his position that *Fugate* entitles him to have his 6-year sentence reduced by the additional 472 days of jail-time credit that he served on the 2010 and 2012 cases. This is essentially the same argument relator submitted to the magistrate under the "clear legal right" section of his petition. (Petition for Writ of Mandamus, 2.) Our review of the magistrate's decision confirms that the magistrate considered this argument at length and concluded that, because relator did not serve the 472 days on the 2013 case, *Fugate* is distinguishable. Our independent review of the matter confirms the magistrate properly applied the law. Accordingly, relator's first objection is overruled.

B. Second Objection

{¶ 8} Regarding his second objection, which challenges the magistrate's conclusion that relator's mandamus action is barred by a plain and adequate remedy at law, relator again resubmits his argument from his petition that the sentence was correct and an issue arose "[o]nly upon [ODRC's] interpreting, altering and amending that sentence * * * in deciding not to provide 472 days of jail time credit." (Relator's

Objections to Magistrate's Decision of 01/23/15, 2.) Relator offers *State ex. rel. Dailey v. Morgan*, 115 Ohio Misc.2d 44 (C.P.2001), as his sole authority in support of his objection. However, as a habeas corpus case dealing with ODRC's improper refusal to credit the jail-time credit awarded by the trial court on the petitioner's consecutive sentences, *Dailey* is factually and procedurally distinct from the issue of whether a plain and adequate remedy at law exists in this case.

{¶ 9} Further, our independent review of the matter again shows the magistrate properly applied the law. As previously stated, a writ of mandamus cannot issue if relator had an adequate remedy, "regardless of whether [the remedy] was used." *Frett v. State*, 8th Dist. No. 100241, 2013-Ohio-5441, ¶ 5, citing *State ex rel. Tran v. McGrath*, 78 Ohio St.3d 45, 47 (1997). Where a defendant seeks application of jail-time credit on each of his concurrent sentences as opposed to a single credit toward one sentence, one adequate remedy available to the defendant is the direct appeal of the sentence. See *Rankin* at ¶ 10; *Fugate* at ¶ 6; *State v. Inboden*, 10th Dist. No. 14AP-312, 2014-Ohio-5762, ¶ 11; *State v. McDonald*, 1st Dist. No. C-140303, 2015-Ohio-1911, ¶ 13; *State v. Primack*, 4th Dist. No. 13CA23, 2014-Ohio-1771, ¶ 14.

{¶ 10} Here, as in *Rankin* and *Fugate*, relator could have appealed his sentence directly. Furthermore, relator utilized the statutory process for correcting "any error" in determining jail-time credit, codified in R.C. 2919.19(B)(2)(g)(iii), by filing with the trial court a motion to order proper application of jail-time credit and did not appeal from the trial court's decision to deny his jail-time credit motion.¹

{¶ 11} As a result, an adequate remedy at law existed for relator, and, therefore, the extraordinary remedy of mandamus is inappropriate. Accordingly, relator's second objection is overruled.

IV. CONCLUSION

{¶ 12} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objections, we find the magistrate has properly stated the pertinent facts and applied the appropriate law. Therefore, we overrule

¹ See, e.g., *State v. Dean*, 10th Dist. No. 14AP-173, 2014-Ohio-4361, ¶ 1; *State v. Smith*, 10th Dist. No. 14AP-247, 2014-Ohio-4228, ¶ 6; *Inboden* at ¶ 4. But see *State v. Thompson*, 12th Dist. No. CA2014-04-010 (June 5, 2014), *appeal accepted for review*, 140 Ohio St.3d 1506, 2014-Ohio-5098.

relator's objections to the magistrate's decision and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus.

*Objections overruled;
writ of mandamus denied.*

TYACK and LUPER SCHUSTER, JJ., concur.

APPENDIX
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

[State of Ohio ex rel. Matthew T. Johnson,	:	
Relator,	:	
v.	:	No. 14AP-616
Ohio Department of	:	(REGULAR CALENDAR)
Rehabilitation and Corrections,	:	
Respondent].	:	
	:	

MAGISTRATE'S DECISION

Rendered on January 23, 2015

Matthew T. Johnson, pro se.

Michael DeWine, Attorney General, and Caitlyn A. Nestleroth, for respondent.

IN MANDAMUS
ON RESPONDENT'S MOTION TO DISMISS

{¶ 13} Relator, Matthew T. Johnson, is an inmate of the Grafton Correctional Institution. On January 28, 2014, the Summit County Court of Common Pleas ("trial court") sentenced relator in three criminal cases which were brought respectively in the years 2010, 2012, and 2013. In the 2010 case, the trial court found a violation of the conditions of community control and sentenced relator for a definite period of twelve months on a felony charge of burglary committed November 9, 2010.

{¶ 14} In the 2012 case, the trial court found a violation of the conditions of community control and sentenced relator for a definite period of six months on a felony charge of heroin possession committed March 27, 2012. The trial court ordered that the sentences imposed in the 2010 and 2012 cases be served consecutively and that relator be given aggregate credit of 472 days of jail time.

{¶ 15} In the 2013 case, following guilty pleas, the trial court sentenced relator for a definite term of six years on each of nine counts of burglary, for a definite term of twelve months for each of three counts of theft, and for another definite term of six years on another burglary count. The burglaries and thefts were committed during June and July 2013. The trial court ordered that the thirteen sentences in the 2013 case be served concurrently with one another. Further, the trial court ordered the sentences in the 2013 case be served concurrently with the sentences imposed in the 2010 and 2012 cases. In the 2013 case, the trial court ordered that relator be given credit for 170 days of jail time.

{¶ 16} In this original action, relator requests a writ of mandamus ordering respondent Ohio Department of Rehabilitation and Corrections ("ODRC"), to credit the 472 days of jail time to the 2013 sentence in addition to the 170 days already credited by the trial court such that relator's 2013 sentence would be credited for a total of 642 days of jail time.

Findings of Fact:

{¶ 17} 1. On August 8, 2014, relator filed this mandamus action against respondent.

{¶ 18} 2. Relator attached to his complaint, copies of three journal entries of the trial court. The three journal entries were filed by the trial court in case Nos. CR 2010-11-3212 (B), CR 2012-03-0909, and CR 2013-08-2241 (C). These three cases shall be referred to respectively as the 2010 case, the 2012 case, and the 2013 case.

{¶ 19} 3. The three journal entries involve the sentencing of relator on January 28, 2014 in the three cases. The sentences imposed and the jail time given are as set forth above. To briefly reiterate, in the 2010 and 2012 cases involving violations of community control, relator was sentenced to serve twelve months and six months consecutively, and was credited with 472 days of jail time. In the 2013 case involving

guilty pleas to burglary and theft charges, relator was sentenced to serve definite terms of six years on each of the burglary charges and definite terms of twelve months on each of the theft charges. The sentences in the 2013 case were ordered to be served concurrently with one another. Furthermore, the sentences in the 2013 case were ordered to be served concurrently with the sentences in the 2010 and 2012 cases. In the 2013 case, relator was credited with 170 days of jail-time credit.

{¶ 20} Relator also attached to his complaint a copy of another trial court entry filed July 11, 2014 in case No. CR 2010-11-3212 (B). This entry states:

[T]his matter comes before the Court on the Defendant's Motion to Order Proper Application of Jail Time Credit. The Defendant is attempting to have jail credit from his 2010 and 2012 cases applied to the 2013 case. The Court does not understand how a Defendant can earn jail credit before the 2013 offense[s] occur[ed].

The Court finds that proper jail credit was granted in this Court's sentencing entries and, therefore, IT IS HEREBY ORDERED it does not find the Defendant's Motion well taken and it is denied.

(Emphasis sic.)

{¶ 21} 4. On September 9, 2014, respondent filed a motion to dismiss.

{¶ 22} 5. On September 22, 2014, relator filed a memorandum contra the motion to dismiss. Relator also asked for summary judgment.

{¶ 23} 6. On September 24, 2014, respondent filed its reply in support of its motion to dismiss.

{¶ 24} 7. On October 15, 2014, relator filed a surreply.

{¶ 25} 8. On October 22, 2014, respondent moved to strike relator's surreply.

{¶ 26} 9. On December 10, 2014, the magistrate issued an order setting relator's September 22, 2014 motion for summary judgment for submission to the magistrate on December 29, 2014.

{¶ 27} 10. Subsequent to the magistrate's December 10, 2014 order, relator has not filed any documents in this action.

Conclusions of Law:

{¶ 28} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶ 29} Relator relies upon *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, in support of his request for a writ of mandamus. Accordingly, a review of that case is in order.

{¶ 30} In *Fugate*, the syllabus states:

When a defendant is sentenced to concurrent prison terms for multiple charges, jail-time credit pursuant to R.C. 2967.191 must be applied toward each concurrent prison term.

{¶ 31} Appellant, Daniel J. Fugate, was indicted in case No. 05CR-4367 on one count of burglary, a second-degree felony, and one count of theft, a fifth-degree felony. A jury later found him guilty of theft as charged in the indictment and of the lesser included charge of burglary, a third-degree-felony

{¶ 32} Fugate had previously been convicted in case No. 05CR-1414 for receiving stolen property and had been placed on community control. Following his indictment for burglary and theft, the probation department moved to revoke community control.

{¶ 33} At the revocation hearing, the probation officer informed the court that Fugate had 216 days of jail-time credit, and the prosecutor suggested that the credit be applied only to the sentence for violation of community control. Defense counsel did not object, and the trial court imposed a prison term of twelve months for the community-control violation, noting the jail-time credit. The trial court stated that the sentence was to run concurrently with the sentences to be imposed for the burglary and theft convictions.

{¶ 34} The trial court then imposed a concurrent two-year prison term for the burglary conviction. No jail-time credit was allowed and defense counsel did not object.

{¶ 35} At a later resentencing, held because the trial court had failed to sentence Fugate on the theft conviction, the trial court imposed a six-month term to run concurrently with the two-year term for burglary.

{¶ 36} Fugate appealed, arguing in part, that he should have received jail-time credit of 213 days toward each of his concurrent prison sentences. (There is a discrepancy in the transcript regarding the number of days of jail-time credit, but Fugate did not object).

{¶ 37} This court affirmed. Fugate appealed to the Supreme Court of Ohio. The Supreme Court reversed the judgment of this court and remanded the cause to the trial court for an adjustment in Fugate's sentence.

{¶ 38} The *Fugate* court invoked the Equal Protection Clauses of the Ohio United States Constitutions, R.C. 2967.191 and Ohio Adm.Code 5120-2-04(F), which currently states:

If an offender is serving two or more sentences, stated prison terms or combination thereof concurrently, the department shall independently reduce each sentence or stated prison term for the number of days confined for that offense. Release of the offender shall be based upon the longest definite, minimum and/or maximum sentence or stated prison term after reduction for jail time credit.

{¶ 39} The *Fugate* court explained its decision:

[W]hen concurrent prison terms are imposed, courts do not have the discretion to select only one term from those that are run concurrently against which to apply jail-time credit. R.C. 2967.191 requires that jail-time credit be applied to all prison terms imposed for charges on which the offender has been held. If courts were permitted to apply jail-time credit to only one of the concurrent terms, the practical result would be, as in this case, to deny credit for time that an offender was confined while being held on pending charges. So long as an offender is held on a charge while awaiting trial or sentencing, the offender is entitled to jail-time credit for that sentence; a court cannot choose one of several concurrent terms against which to apply the credit.

Id. at ¶ 12.

{¶ 40} Clearly, contrary to relator's position here, *Fugate* does not compel that the 472 days of jail time that the trial court credited only to the 2010 and 2012 cases be credited also to the 2013 case.

{¶ 41} There is no allegation here that the 472 days of jail time was a consequence, even in part, of relator being held on the thirteen charges in the 2013 case involving the June and July 2013 burglaries and thefts. Thus, the situation here contrasts with the scenario described by the *Fugate* court:

As the sentencing hearing transcript indicates, Fugate was indeed held in custody on the burglary and theft charges and for violation of community control and is therefore entitled to jail-time credit against each concurrent prison term.

Id. at ¶ 18.

{¶ 42} The *Fugate* case is also distinguishable from the instant case in another important respect. Fugate appealed his sentences, including the jail-time credit issue to this court and ultimately to the Supreme Court of Ohio. By contrast, the instant action is not an appeal, but has been brought as an original action in mandamus.

{¶ 43} Apparently, relator failed to appeal his sentences imposed by the Summit County Court of Common Pleas. Instead he endeavors here to challenge those sentences in mandamus. Thus, this original action is barred by the plain and adequate remedy at law that relator apparently failed to pursue, i.e., an appeal.

{¶ 44} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/S/ MAGISTRATE
KENNETH W. MACKE

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).