

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State ex rel. [Darek Lathan],	:	
Relator,	:	
v.	:	No. 16AP-472
Judge Kimberly Cocroft,	:	(REGULAR CALENDAR)
Respondent.	:	

D E C I S I O N

Rendered on September 30, 2016

On brief: *Derek Lathan, pro se.*

IN PROCEDENDO
ON SUA SPONTE DISMISSAL

HORTON, J.

{¶ 1} Relator, Darek Lathan, a pro se inmate, commenced this original action requesting this court issue a writ of procedendo ordering respondent, the Honorable Kimberly Cocroft, a judge of the Franklin County Court of Common Pleas, to "enter default judgment, summary judgment, [and] declaratory judgment" in his underlying criminal case.

{¶ 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 issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate recommended that this court dismiss this action for relator's failure to comply with the mandatory filing requirements of R.C. 2969.25(A) and (C). No objections have been filed to the magistrate's decision.

{¶ 3} Having conducted an independent review of the record in this matter, and taking judicial notice of relator's prior civil actions and appeal within the past five years,

we find 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, and its recommendation to dismiss this action for failure to comply with R.C. 2969.25(A) and (C). Accordingly, the requested writ of procedendo is dismissed.

Action dismissed.

BRUNNER, J., concurs.

LUPER SCHUSTER, J., concurs in judgment only.

APPENDIX**IN THE COURT OF APPEALS OF OHIO****TENTH APPELLATE DISTRICT**

The State ex rel. [Darek Lathan],	:	
Relator,	:	
v.	:	No. 16AP-472
Judge Kimberly Cocroft,	:	(REGULAR CALENDAR)
Respondent.	:	

MAGISTRATE'S DECISION

Rendered on June 30, 2016

Darek Lathan, pro se.

**IN PROCEDENDO
ON SUA SPONTE DISMISSAL**

{¶ 4} Relator, Darek Lathan, has filed this original action requesting that this court issue a writ of procedendo ordering respondent, the Honorable Kimberly Cocroft, judge of the Franklin County Court of Common Pleas to "enter default judgment, summary judgment, declaratory judgment" in his underlying criminal case, C.P. No. 16CV001971.

Findings of Fact:

{¶ 5} 1. Relator is an inmate currently incarcerated at North Central Correctional Institution.

{¶ 6} 2. On June 22, 2016, relator filed this procedendo action.

{¶ 7} 3. At the time he filed his complaint, relator did not file an affidavit listing each civil action or appeal of a civil action that he has filed in the past five years.

{¶ 8} 4. Relator also did not pay the filing fee nor did he file an affidavit of indigency and did not file an affidavit including a statement of the amount in his inmate account for each of the preceding six months as certified by the institutional cashier nor a statement of all other cash and things of value he owns.

Conclusions of Law:

{¶ 9} The magistrate recommends that this court sua sponte dismiss this action because relator has failed to comply with the requirements of both R.C. 2969.25(A) and (C).

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

{¶ 11} 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 the inmate's account for each of 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.

{¶ 12} 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.*, 87 Ohio St.3d 258 (1999); *State ex rel. Zanders v. Ohio Parole Bd.*, 82 Ohio St.3d 421 (1998); *State ex rel. Alford v. Winters*, 80 Ohio St.3d 285 (1997).

{¶ 13} In the present action, relator has not filed the required affidavit regarding other civil actions that relator has filed, if any.

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 ten dollars) is forwarded to the clerk each month until the fees are paid.

{¶ 14} In *Fuqua v. Williams*, 100 Ohio St.3d 211, 2003-Ohio-5533, an inmate, Carlos J. Fuqua, filed in the Allen County Court of Appeals a petition for a writ of habeas corpus. He requested leave to proceed in forma pauperis but he did not file the affidavit required by R.C. 2969.25(A) describing each civil action or appeal of a civil action that he had filed in the previous five years in any state or federal court.

{¶ 15} Fuqua's prison warden, Jesse J. Williams, moved to dismiss the petition.

{¶ 16} Fuqua requested leave in the court of appeals to amend his petition with the affidavit required by R.C. 2969.25(A).

{¶ 17} The court of appeals dismissed the petition for habeas corpus and Fuqua appealed as of right to the Supreme Court of Ohio.

{¶ 18} The Supreme Court, in *Fuqua* at ¶ 9 states:

Fuqua's belated attempt to file the required affidavit does not excuse his non-compliance. 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.)

{¶ 19} In *Hawkins v. S. Ohio Correctional Facility*, 102 Ohio St.3d 299, 2004-Ohio-2893, an inmate, Jomo Hawkins, petitioned the Scioto County Court of Appeals for a writ of habeas corpus. However, Hawkins' petition did not contain the R.C. 2725.04(D) commitment papers nor the affidavit required by R.C. 2969.25(A). Later, Hawkins filed an un-notarized statement purporting to be his R.C. 2969.25(A) affidavit.

{¶ 20} Following dismissal of his action, Hawkins appealed as of right to the Supreme Court. Citing *Fuqua*, the *Hawkins* court affirmed the judgment of the court of appeals.

{¶ 21} In *State ex rel. Pamer v. Collier*, 108 Ohio St.3d 492, 2006-Ohio-1507, the Supreme Court affirmed the judgment of the court of appeals from Medina County which had dismissed the complaint of George D. Pamer, an inmate at Mansfield Correctional Institution, for his failure to comply with the requirements of R.C. 2969.25(C). Specifically, the court stated:

Pamer's cashier statement did not set forth the account balance for the month immediately preceding his mandamus complaint - August 2005. See R.C. 2969.25(C)(1), which requires an inmate filing a civil action against a government

employee seeking waiver of prepayment of court filing fees to file a "statement that sets forth the balance in the inmate account for each of the preceding six months, as certified by the institutional cashier." Pamer's failure to comply with R.C. 2969.25(C)(1) warranted dismissal of the complaint. *State ex rel. Foster v. Belmont Cty. Court of Common Pleas*, 107 Ohio St.3d 195, 2005-Ohio-6184, 837 N.E.2d 777, ¶ 5.

In addition, nothing in R.C. 2969.25 required the court of appeals to afford Pamer the opportunity to pay the requisite filing fee before dismissing the case when Pamer expressly requested waiver of prepayment of those fees.

Finally, because Pamer did not prevail and did not establish his indigency, the court of appeals did not abuse its discretion in ordering him to pay the costs of the proceeding. See *State ex rel. Frailey v. Wolfe* (2001), 92 Ohio St.3d 320, 321, 750 N.E.2d 164; Civ.R. 54(D).

Id. at ¶ 5-7.

{¶ 22} Likewise, in *State ex rel. Ridenour v. Brunzman*, 117 Ohio St.3d 260, 2008-Ohio-854, the Supreme Court of Ohio affirmed the judgment of the Ross County Court of Appeals which had dismissed the complaint filed by William L. Ridenour because of his failure to comply with R.C. 2969.25(C). In that case, Ridenour had filed a motion for reconsideration attaching a statement setting forth his inmate account balance for the six months preceding the filing of his complaint; however, the statement was not certified by the prison cashier.

{¶ 23} In affirming the judgment of the appellate court, the Supreme Court stated:

"The requirements of R.C. 2969.25 are mandatory, and failure to comply with them subjects an inmate's action to dismissal." *State ex rel. White v. Bechtel*, 99 Ohio St.3d 11, 2003 Ohio 2262, 788 N.E.2d 634, P 5. Ridenour failed to comply with R.C. 2969.25(C)(1), which requires an inmate filing a civil action against a government employee seeking waiver of prepayment of court filing fees to file with the complaint 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."

Moreover, although Ridenour claims that the court erred in failing to grant him leave to amend his complaint to comply

with R.C. 2969.25(C)(1), he never filed a motion to amend his complaint. Instead, he filed a motion for reconsideration, which was "a nullity because his mandamus action was filed originally in the court of appeals, rendering App.R. 26(A) inapplicable." *State ex rel. Washington v. Crush*, 106 Ohio St.3d 60, 2005 Ohio 3675, 831 N.E.2d 432, P 5.

Id. at ¶ 5-6.

{¶ 24} Pursuant to the above-cited authority and because relator cannot cure these deficiencies now or at a later date, it is this magistrate's decision that this court should dismiss relator's complaint.

{¶ 25} Because relator has failed to comply with the mandatory filing requirements of R.C. 2969.25(A) and (C), it is this magistrate's decision that this court should dismiss this action. Further, pursuant to the above-cited authority, inasmuch as relator did not prevail and did not establish indigency, this court should order relator to pay the costs of the proceedings.

/S/ MAGISTRATE
STEPHANIE BISCA

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).