

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State ex rel. Thomas Davidek,	:	
Relator,	:	
v.	:	No. 16AP-570
Franklin County Court of Common Pleas,	:	(REGULAR CALENDAR)
Respondent.	:	

D E C I S I O N

Rendered on November 22, 2016

On brief: *Thomas Davidek, pro se.*

IN MANDAMUS

LUPER SCHUSTER, J.

{¶ 1} Relator, Thomas Davidek, has filed an original action requesting this court issue a writ of mandamus ordering respondent, Franklin County Court of Common Pleas, to vacate his sentence in Franklin C.P. No. 12CR-3550.

{¶ 2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, including findings of fact and conclusions of law, recommending this court sua sponte dismiss the action. No objections to that decision have been filed.

{¶ 3} Pursuant to Civ.R. 53(D)(4)(c), because no objections have been filed, we must review the magistrate's decision for any error of law or other defect on its face. The magistrate's decision notes that Davidek did not file with his complaint an affidavit that contains a description of each civil action or appeal of a civil action that he has filed in the previous five years. The magistrate identifies this failure as one of the multiple bases to dismiss this action. However, the magistrate's decision does not indicate whether

Davidek has in fact filed a civil action or appeal that must be reported. Although R.C. 2969.25(A) requires an inmate commencing a civil action against a government entity or employee to file an affidavit that contains a description of each civil action or appeal of a civil action filed in the previous five years, such an affidavit is not required if the inmate has in fact filed no civil actions in the five preceding years. *Arega v. Coleman*, 10th Dist. No. 15AP-629, 2015-Ohio-5242, ¶ 11. Thus, insofar as the magistrate's decision indicates that an R.C. 2969.25(A) affidavit is always required, even if the inmate has in fact filed no civil actions in the five preceding years, we disagree with the magistrate's decision. Regardless, because Davidek failed to meet the requirements of R.C. 2969.25(C), as explained in the magistrate's decision, dismissal of this action is still appropriate.

{¶ 4} Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law, except as it relates to the application of R.C. 2969.25(A). In accordance with the magistrate's decision, we sua sponte dismiss this action.

Action dismissed.

KLATT, J., concurs.

HORTON, J., concurs in judgment only.

HORTON, J., concurring in judgment only.

{¶ 5} I agree with the majority's decision regarding Davidek's failure to satisfy R.C. 2969(C) and therefore concur in the judgment that this matter requires dismissal. However, because I believe the magistrate's decision should be adopted in its entirety, I concur in judgment only.

{¶ 6} The majority correctly recognizes that "because no objections have been filed, we must review the magistrate's decision for any error of law or other defect on its face." (Majority Decision at ¶ 3.) While the majority highlights the magistrate's failure to indicate whether Davidek had in fact filed a civil action or appeal within the previous five years, it ignores the ambiguity contained within this revelation.

{¶ 7} On the face of the decision, we do not know why the magistrate used R.C. 2969.25(A) as a ground for dismissal. It could be that there is in fact a civil case or appeal that Davidek has filed within the previous five years which requires the affidavit. Or, it

could be as the majority suggests, i.e., that the magistrate actually believes "that an R.C. 2969.25(A) affidavit is always required, even if the inmate has in fact filed no civil actions or appeals within the five preceding years." (Majority Decision at ¶ 3.)

{¶ 8} As the majority notes, such an affidavit is not required when the inmate has not filed a previous action. *State ex rel. Wickensimer v. Bartleson*, 123 Ohio St.3d 154, 2009-Ohio-4695, ¶ 3 ("The plain language of the statute includes no requirement that inmates who have not filed a civil action or appeal of a civil action against a government entity or employee in the requisite five-year period file this affidavit."). Nevertheless, the magistrate nowhere asserts the incorrect proposition of law that, based on an inference, the majority "disagrees" with.

{¶ 9} Because on its face the magistrate's decision is at best ambiguous, I disagree with the majority's decision to not fully adopt the magistrate's decision. Accordingly, I concur in judgment only.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State ex rel. Thomas Davidek,	:	
	:	
Relator,	:	
	:	
v.	:	No. 16AP-570
	:	
Franklin County Court of Common Pleas,	:	(REGULAR CALENDAR)
	:	
Respondent.	:	

MAGISTRATE'S DECISION

Rendered on August 22, 2016

Thomas Davidek, pro se.

IN MANDAMUS
ON SUA SPONTE DISMISSAL

{¶ 10} In this original action, relator, Thomas Davidek, an inmate of the Chillicothe Correctional Institution ("CCI"), requests that a writ of mandamus issue against respondent, Franklin County Court of Common Pleas.

Findings of Fact:

{¶ 11} 1. On August 9, 2016, relator, a CCI inmate, filed this original action against respondent.

{¶ 12} 2. Relator has not deposited with the clerk of this court the monetary sum required as security for payment of costs. See Loc.R. 13(B) of the Tenth District Court of Appeals.

{¶ 13} 3. Relator has not filed with his complaint a motion for leave to proceed in forma pauperis supported by an affidavit showing indigency, pursuant to Loc.R. 13(B).

{¶ 14} 4. Relator has not filed with his complaint an affidavit that he is seeking a waiver of the prepayment of this court's full filing fees and an affidavit of indigency as required by R.C. 2969.25(C).

{¶ 15} 5. Relator has not filed with his complaint a statement that sets forth the balance in his inmate account for each of the preceding six months, as certified by the institutional cashier.

{¶ 16} 6. Relator has not filed with his complaint 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, pursuant to R.C. 2969.25(A).

Conclusions of Law:

{¶ 17} R.C. 2969.25 provides:

(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;

(2) A statement that sets forth all other cash and things of value owned by the inmate at that time.

{¶ 18} Here, relator has failed to file with his complaint, pursuant to R.C. 2969.25(C), an affidavit that he is seeking a waiver of the prepayment of this court's full filing fees and an affidavit of indigency. Relator has also failed to file the R.C. 2969.25(C)(1) statement certified by the institutional cashier.

{¶ 19} In addition, relator has failed to file with his complaint the R.C. 2969.25(A) affidavit that contains a description of each civil action or appeal of a civil action that he has filed in the previous five years in any state or federal court.

{¶ 20} Because relator has failed to satisfy the mandatory filing requirements set forth at R.C. 2969.25, this court must sua sponte dismiss this action. *Fuqua v. Williams*, 100 Ohio St.3d 211, 2003-Ohio-5533; *Hawkins v. S. Ohio Corr. Facility*, 102 Ohio St.3d 299, 2004-Ohio-2893.

{¶ 21} Accordingly, for all the above reasons, it is the magistrate's decision that this court sua sponte dismiss this action.

/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).