

[Cite as *Maxwell v. Jones*, 2010-Ohio-1633.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

MARK W. MAXWELL,	:	
Appellant,	:	CASE NO. CA2009-07-179
- vs -	:	<u>OPINION</u>
	:	4/12/2010
SHERIFF RICHARD JONES,	:	
Appellee.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2009-04-1799

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appellee

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POWELL, P.J.

{¶1} Appellant, Mark Maxwell, appeals the decision of the Butler County Court of Common Pleas denying his petition for a writ of habeas corpus to compel his release from the Butler County Jail.

{¶2} Maxwell was originally convicted in Franklin County, Ohio and sentenced to prison. After a series of appeals, Maxwell was resentenced in 2004 to

two years in prison. The resentencing entry indicated that he was credited with the five years and three months he had already served in prison for the offenses, in addition to any time served awaiting transport to the institution. The parties agree that Maxwell was released from prison on November 29, 2004.

{13} According to the record, Maxwell was found to have violated the conditions of his postrelease control in April 2009 and ordered by the adult parole authority to return to prison for 180 days. Maxwell, who was being held in the Butler County Jail, filed his petition for the writ with the common pleas court against appellee, Butler County Sheriff Richard Jones. The court denied his petition in June 2009. Maxwell now appeals, submitting a single assignment of error for our review.

{14} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO GIVE THIS DEFENDANT CREDIT FOR TIME SERVED AGAINST HIS ENTIRE SENTENCE."

{15} Maxwell argues in his issue presented for review that "once a valid sentence has been executed, according to Ohio law, and the time served, the sentence is not subject to modification by the adult parole authority, and a defendant is entitled to credit of all his time served on a particular case and charges."

{16} In contesting his confinement, Maxwell first argues that he served more than three years beyond his imposed prison term and therefore, he received credit for this time against his period of postrelease control, which would result in an expiration of his postrelease control in 2006, well before the 2009 violations. Maxwell also argues that with the credit for time served, he cannot serve any time in jail or prison on a postrelease control violation because, according to R.C. 2967.28, the maximum he could serve on a violation was half of his two-year prison term, and he already

served three years and three months beyond his prison sentence.

{¶7} A writ of habeas corpus is an extraordinary remedy available where there is an unlawful restraint of a person's liberty and no adequate remedy at law. See *Agee v. Russell*, 92 Ohio St.3d 540, 544, 2001-Ohio-1279.

{¶8} We note that the petition filed by Maxwell was not verified in accordance with R.C. 2725.04, but was signed and filed by Maxwell's counsel. See *Chari v. Vore*, 91 Ohio St.3d 323, 2001-Ohio-49. However, we will not decide the case on this basis because it appears that there was a complete understanding of Maxwell's claims as the parties did not contest the facts set forth in the petition and the facts were accepted by the common pleas court in making its decision.

{¶9} We are also cognizant that Maxwell is likely no longer confined for the violation at issue in this case. When a petitioner for habeas corpus relief is no longer imprisoned and no longer confined in the court's jurisdiction, the application must be dismissed. R.C. 2725.01 (writ to inquire into the cause of such imprisonment, restraint, or deprivation); R.C. 2725.04; *Waterhouse v. Warden of Belmont Correctional Inst.*, Belmont App. No. 04 BE 44, 2004-Ohio-7207; *Harrod v. Harris* (May 11, 2001), Hamilton App. No. C-000791 (when confinement in prison or jail has terminated, the legality of such restraint can no longer be determined in a habeas corpus proceeding).

{¶10} Habeas corpus is generally appropriate in the criminal context only if the petitioner is entitled to immediate release from prison. *Larsen v. State*, 92 Ohio St.3d 69, 2001-Ohio-133. If the petitioner is subsequently released, his habeas corpus claim is normally rendered moot, unless it is a claim that is capable of

repetition, yet evading review. *Id.*; *Adkins v. McFaul*, 76 Ohio St.3d 350, 350-351, 1996-Ohio-388.

{¶11} With Maxwell's release from confinement, his petition for habeas corpus is moot. However, Maxwell's claims are capable of repetition yet evading review, and, therefore, we will consider the issues set forth in his petition. See *Adkins; Waterhouse*.

{¶12} We find that Maxwell's first argument is not appropriate for habeas corpus relief. Maxwell's claim that the excess time he spent in prison should be credited toward the *period* of postrelease control is a sentencing issue and should have been the subject of an appeal or postconviction remedy rather than habeas corpus. See *Watkins v. Collins*, 111 Ohio St.3d 425, 431, 2006-Ohio-5082, ¶39-40 (generally, sentencing errors by a court that had proper jurisdiction cannot be remedied by extraordinary writ because petitioner has or had adequate remedies, e.g., appeal and postconviction relief, for review of any alleged sentencing error).

{¶13} The five-year period of postrelease control was imposed as part of Maxwell's resentence in 2004 and Maxwell was subsequently released. Any issues related to the postrelease control period imposed should have been challenged at that time. See R.C. 2967.28; see *Woods v. Telb*, 89 Ohio St.3d 504, 512, 2000-Ohio-171 (postrelease control is part of the original judicially imposed sentence); see, also, *Harrod*, Hamilton App. No. C-000791 (declines to extend the availability of the extraordinary remedy of habeas corpus beyond its well-established limits to placement on postrelease control).

{¶14} We do find cognizable Maxwell's claim that his three years of excess credit for time served should be applied to his prison sanction ordered in 2009 for his

violation of postrelease control. Cf. *State v. McCarty*, Butler App. No. CA2006-04-093, 2007-Ohio-2290, ¶16 (ripeness of issue on review).

{¶15} To bolster his claims, Maxwell relies on R.C. 2967.191, which states that the department of rehabilitation and correction shall reduce the stated prison term of a prisoner * * * by the total number of days that the prisoner was confined for any reason arising out of the offense for which the prisoner was convicted and sentenced, including confinement in lieu of bail while awaiting trial, confinement for examination to determine the prisoner's competence to stand trial or sanity, and confinement while awaiting transportation to the place where the prisoner is to serve the prisoner's prison term.¹

{¶16} R.C. 2929.01 defined a "stated prison term" as the prison term, mandatory prison term, or combination of all prison terms and mandatory prison terms imposed by the sentencing court pursuant to R.C. 2929.14 or R.C. 2971.03.

{¶17} Maxwell also cites to R.C. 2949.08, which provides for a reduction of sentence for time served prior to conviction for individuals sentenced to jail or community-based correctional facilities.

{¶18} We could find no case law or statutory authority on point on the issue of whether credit for time served on the original sentence could be applied against the prison or jail sanction for a postrelease control violation. R.C. 2967.191 evinces the general intent to grant credit for time served for reasons arising out of the offense for which an individual was convicted. Cf. *State v. Martello*, 97 Ohio St.3d 398, 2002-Ohio-6661, ¶26 (sanction for postrelease violation did not violate double jeopardy

1. While the numbering of statutory subdivisions for the statutes cited in this opinion may have changed through the years, R.C. 2929.01, R.C. 2967.191, R.C. 2967.28, and R.C. 2949.08 contained the language cited in this opinion during the time frame applicable in Maxwell's case.

clause because such a term of incarceration is attributable to the original sentence).

{¶19} After consideration of the unique issues presented here, we find that Maxwell was entitled to have his prison credit applied to the prison sanction for the violation of postrelease control. Since Maxwell received credit for more than three years in excess of his two-year prison sentence and the most prison or jail time he could serve for a postrelease control violation is one year, a prison or jail time sanction was not available for Maxwell's violation. See R.C. 2967.28.

{¶20} We would sustain Maxwell's assignment of error only as it relates to his second claim for credit for time served and moot all other aspects of his assignment of error. However, the decision of the common pleas court is affirmed for the reason that Maxwell is not entitled to a writ of habeas corpus because he is no longer incarcerated.

{¶21} Writ denied.

RINGLAND and HENDRICKSON, JJ., concur.