

[Cite as *State v. Russell*, 2011-Ohio-390.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO

Plaintiff

v.

JAMES A. RUSSELL

Defendant

Appellate Case No. 24257

Tr. Ct. Case No. 04-CR-3840/2

DECISION AND FINAL JUDGMENT ENTRY

January 26th, 2011

PER CURIAM:

{¶ 1} This matter is before the court on James A. Russell's petition for a writ of mandamus. Russell seeks a writ prohibiting the Montgomery County Clerks Office and the Lebanon Correctional Institution Collection Designee from collecting restitution and court costs associated with Russell's criminal case, 04-CR-3840/2, in the amount of \$19,847.12. Russell further asks that this Court suspend any withdrawal of funds from his inmate account with respect to the restitution and court costs pending his appeal in Montgomery App. No. 23454.

{¶ 2} We note that Russell's conviction and sentence were reversed and remanded to the trial court on October 1, 2010. See *State v. Russell*, Montgomery App.

No. 23454, 2010-Ohio-4765. In relevant part, this Court found there to be no evidence in the underlying trial record of Russell's present and future ability to pay restitution in the amount of \$15,498.25. Id. at ¶¶63-64. Therefore, we vacated the trial court's restitution order. Id. at ¶65. Any argument herein raised with respect to the restitution order appears to be moot.

{¶ 3} On October 1, 2010, Respondents filed a motion to dismiss the present action in mandamus on the grounds that (1) Russell failed to provide an affidavit of indigence pursuant to R.C. 2969.25(C) containing a certified statement showing his inmate account balance for each of the preceding six months and listing the cash and other valuables Russell possesses; (2) Russell failed to properly caption his petition as being brought in the name of the state on the relation of the person applying; and (3) Russell has an adequate remedy at law to challenge the imposition of court costs by way of appeal from his sentencing entry.

{¶ 4} Having received no response from Russell to Respondents' motion to dismiss, this Court ordered him on October 26, 2010 to show cause why the present action should not be dismissed on the grounds set forth by Respondents and/or for failure to prosecute. Russell thereafter filed a "Motion in Contra to Prosecutions Motion to Dismiss" on November 3, 2010. Therein, Russell argues that he is entitled to an order vacating the court costs that were assessed against him in connection with his underlying criminal case because the trial court did not determine the specific amount, \$4348.87, at the time of sentencing.

{¶ 5} Upon consideration of the foregoing, this Court finds Respondents' motion to dismiss well-taken.

{¶ 6} Respondents first argue that the petition for a writ of mandamus must be dismissed because Russell did not comply with R.C. 2969.25(C), which provides:

{¶ 7} “(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:

{¶ 8} “(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;

{¶ 9} “(2) A statement that sets forth all other cash and things of value owned by the inmate at that time.”

{¶ 10} The Supreme Court of Ohio has held that “ ‘[t]he requirements of R.C. 2969.25 are mandatory, and failure to comply with them subjects an inmate's action to dismissal.’ ” *State ex rel. Norris v. Giavasis*, 100 Ohio St.3d 371, 2003-Ohio-6609, at ¶4, quoting *State ex rel. White v. Bechtel*, 99 Ohio St.3d 11, 2003-Ohio-2262, at ¶5. Here, Russell submitted an affidavit of indigency with his petition, but it did not include a certified statement setting forth the balance in his inmate account for the preceding six months or a statement setting forth the value of his cash and other items owned. Accordingly, Russell's petition for a writ of mandamus warrants dismissal.

{¶ 11} Next, Respondents contend that Russell's petition must be dismissed because he has failed to comply with R.C. 2731.04. This statute requires that an application for a writ of mandamus be brought “in the name of the state on the relation of

the person applying.” Failure to bring an action in mandamus in the name of the state on the relation of the person requesting the writ warrants dismissal. See *Blankenship v. Blackwell*, 103 Ohio St.3d 567, 2004-Ohio-5596, at ¶34.

{¶ 12} Leave shall be granted, however, to amend a complaint so as to comply with R.C. 2731.04 and resolve the matter on its merits rather than a pleading deficiency. *Id.* The duty to request leave to amend lies with the petitioner. Here, even upon notice that his petition failed to comply with R.C. 2731.04, Russell failed to seek leave to correct the deficiency. On this ground, Russell’s petition for a writ of mandamus must be dismissed. *Blankenship*, 2004-Ohio-5596, at ¶36 (finding that relator’s failure to seek leave to amend complaint in mandamus to comply with R.C. 2731.04 warranted dismissal).

{¶ 13} Finally, Respondents claim that Russell had an adequate legal remedy by way of appeal to challenge his court costs. It is well-settled that a writ of mandamus is an extraordinary remedy that only applies in a limited set of circumstances. *In re State ex rel. Watkins*, Greene App. No. 07-CA-80, 2008-Ohio-3877, at ¶6, quoting *Davenport v. Montgomery Cty.*, Montgomery App. No. 21196, 2006-Ohio-2909, at ¶4. To be entitled to the requested writ of mandamus, Russell must establish a clear legal right to the relief he is seeking, a clear legal duty on the part of Respondents to perform as requested, and the lack of an adequate remedy in the ordinary course of law. *State ex rel. Blandin v. Beck*, 114 Ohio St.3d 455, 2007-Ohio-4562, at ¶13.

{¶ 14} Russell argues that the trial court had a duty to orally notify him at his sentencing hearing that it was imposing court costs against him in the specific amount of \$4348.87. In the underlying matter, the court included an assessment of unspecified costs in its May 4, 2009 sentencing entry. According to Russell, because he was

unaware of the specific amount of court costs at the time of sentencing, he was prevented from challenging on appeal said costs.

{¶ 15} R.C. 2947.23 requires that costs assessed in a criminal case be included in the sentencing entry. The Supreme Court of Ohio has stated:

{¶ 16} “Pursuant to R.C. 2947.23, it is undisputed that trial courts have authority to assess costs against convicted criminal defendants. When a court assesses unspecified costs, the only issue to be resolved is the calculation of those costs and creation of the bill.

Calculating a bill for the costs in a criminal case is merely a ministerial task. Therefore, we hold that failing to specify the amount of costs assessed in a sentencing entry does not defeat the finality of the sentencing entry as to costs.” *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, at ¶21, citing *State v. Slater*, Scioto App. No. 01CA2806, 2002-Ohio-5343, at ¶5, fn. 3.

{¶ 17} Russell’s legal remedy to challenge the court’s imposition of court costs was by direct appeal of his sentencing entry. *Threatt*, supra. See, also, *State ex rel. Biros v. Logan*, Trumbull App. No. 2003-T-0016, at ¶10 (finding that res judicata bars relator from collaterally attacking an order imposing court costs in a mandamus action). Likewise, insofar as Russell claims that the trial court did not orally impose court costs at his sentencing hearing, Russell’s adequate legal remedy was to challenge this alleged error on direct appeal. That Russell failed to seek this relief in the ordinary course of law does not render such remedy inadequate. See *State ex rel. Atkins v. Hoover*, 97 Ohio St.3d 76, 2002-Ohio-5313, at ¶5.

{¶ 18} In conclusion, this Court finds that Russell has not demonstrated a sufficient basis to justify extraordinary relief. Accordingly, Respondents’ motion to dismiss is hereby

SUSTAINED. Russell's petition for a writ of mandamus is DENIED, and this matter is DISMISSED.

{¶ 19} We note that the Ohio Attorney General filed a "Limited Notice of Appearance of Counsel" on November 1, 2010. Russell moved to strike said notice, to which the Attorney General filed a memorandum in opposition on November 24, 2010. Russell's motion to strike is hereby OVERRULED.

SO ORDERED.

THOMAS J. GRADY, Presiding Judge

JAMES A. BROGAN, Judge

MIKE FAIN, Judge

To the Clerk: Pursuant to Civil Rule 58(B), please serve on all parties not in default for failure to appear notice of judgment and its date of entry upon the journal.

THOMAS J. GRADY, Presiding Judge

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