

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

Jimmie L. Washington,

Petitioner,

v.

Donald Morgan, Warden,

Respondent.

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Case No. 14CA3664

DECISION AND JUDGMENT ENTRY

RELEASED: 12/29/2014

APPEARANCES:

Jimmie L. Washington, Southern Ohio Correctional Facility, Lucasville, Ohio, Pro se.

Michael DeWine, Ohio Attorney General, and M. Scott Criss, Assistant Attorney General, Columbus, Ohio, for Respondent.

HOOVER, A.J.,

{¶1} Jimmie L. Washington filed a habeas corpus petition seeking his immediate release from the Southern Ohio Correctional Facility. Respondent filed a motion to dismiss pursuant to Civ. R. 12(B)(6) arguing that Washington's petition should be dismissed on procedural grounds because he: (1) failed to verify his petition as required by R.C. 2725.04, (2) failed to file an affidavit that contains a description of each civil action or appeal he has filed in the past five years as required by R.C. 2969.25(A); and (3) failed to include a certified statement of his inmate account for each of the preceding six months as required by R.C. 2969.25(C). Respondent also argues that the petition should be dismissed on substantive grounds because Washington has not

demonstrated that he is entitled to immediate release from confinement, he has an adequate alternative legal remedy, and his petition is barred by the doctrine of res judicata.

{¶12} Washington filed a memorandum in opposition arguing that the trial court did not have jurisdiction to sentence him for a firearm violation because the state failed to specify that the petitioner had a firearm.

{¶13} For the reasons that follow, pursuant to Civ.R. 12(B)(6), Respondent's motion to dismiss is **GRANTED**.

I.

{¶14} In his petition, Washington claims that the state failed to specify in the charging offense that he had a firearm. As a result, he argues that the trial court was without jurisdiction to impose a three-year mandatory prison term as part of his sentence. His petition includes a copy of the commitment papers for Summit County Court of Common Pleas, Case Number CR09030980(A), December 27, 2010. The judgment entry indicates that Washington was sentenced to imprisonment for a period of four years for an aggravated robbery violation of R.C. 2911.01(A)(1) and three years for a firearm violation of R.C. 2941.145, to run consecutively for a total of seven years. Thus, in 2010, Washington was sentenced to a maximum of seven years in prison, which, when given credit for time served, would expire in 2016. Although Washington argues that count one of the indictment did not include a firearm specification, the grand jury indictment he attached, dated April 21, 2009, includes a firearm specification under R.C. 2945.145.

{¶15} Washington's petition is not verified as required by R.C. 2725.04 and, although he lists civil actions and appeals he has filed in the past five years, the list is not set forth in an affidavit as required by R.C. 2969.25(A). His inmate account statement does not comply with R.C. 2969.25(C)(1) because it does not include a balance for *each* of the preceding six months. It includes only one figure: a sixth month average of the monthly first day balance.

{¶16} In addition, the procedural history of the civil actions and appeals he lists in the attachment to his petition shows that Washington appealed his initial conviction, which was affirmed in part and reversed, in part. He was then resentenced and he appealed. The Ninth District Court of Appeals affirmed his resentencing. See *State v. Washington*, 9th Dist. Summit App. No. 25784 (Dec. 21, 2011). He has filed at least five previous habeas corpus petitions, one with the Ninth District Court of Appeals, one with the Supreme Court of Ohio, and three with the Scioto County Court of Common Pleas.

II.

{¶17} Habeas corpus petitions are governed by R.C. 2725. They are available to a person who is "unlawfully restrained of his liberty . . . to inquire into the cause of such imprisonment, restraint, or deprivation." R.C. 2725.01. An individual may petition for a writ of habeas corpus if his maximum sentence has expired and he is being held unlawfully. *State v. Wilburn*, 4th Dist. No. 98CA47, 1999 WL 1281507 (Dec. 22 1999); *Frazier v. Strickrath*, 42 Ohio App.3d 114, 115-116 (4th Dist. 1988).

{¶18} A habeas corpus petition must conform to certain statutory requirements. It must be signed and verified, and it must specify: (A) that the petitioner is imprisoned

or restrained of his liberty; (B) the name of the person restraining the petitioner, if known; (C) the place the petitioner is imprisoned or restrained, if known; and (D) it must include a copy of the commitment papers, if the commitment papers can be obtained without impairing the efficiency of the remedy. R.C. 2725.04.

{¶19} Additionally, the failure to comply with the provisions of R.C. 2969.25 requires the dismissal of the action. *Fuqua v. Williams*, 100 Ohio St. 3d 211, 2003-Ohio-5533, 797 N.E.2d 982. R.C. 2969.25(A) requires an inmate to file with his petition an affidavit describing his previous civil actions and appeals of civil actions against government entities within the preceding five years. R.C. 2969.25(C)(1) requires that 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, 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 must include 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. *Boles v. Knab*, 129 Ohio St.3d 222, 2011-Ohio-2859, 951 N.E.2d 389 (court of appeals did not err in dismissing inmate's petition for a writ of habeas corpus because inmate must include a statement setting forth the balance in his inmate account for *each* of the preceding six months, as certified by the institutional cashier); *State ex rel. McGrath v. McDonnell*, 126 Ohio St.3d 511, 2010-Ohio-4726, 935 N.E.2d 830; *State ex rel. Thacker v. Evans*, 4th Dist. No. 05CA4, 2005-Ohio-933.

{¶10} Washington's petition fails to comply with R.C. 2725.04 because his affidavit of verification was not notarized. Additionally, he failed to comply with R.C. 2969.25(A) because his affidavit describing each civil action or appeal of a civil action filed in the previous five years was not notarized. *Griffin v. McFaul*, 116 Ohio St.3d 30, 2007-Ohio-5506, 876 N.E.2d 527, ¶4 (2007)(failure to notarize the verification of the habeas corpus petition and the affidavit listing the previous civil actions was fatally defective to the petition and it was properly dismissed). Finally, Washington's inmate account statement does not include *each* of the six months preceding his petition. As a result, his petition is defective for failure to comply with R.C. 2969.25(C)(1). *Boles v. Knab*, 129 Ohio St.3d 222, 951 N.E.2d 389, 2011-Ohio-2859.

{¶11} Even if Washington's petition did not suffer from multiple fatal procedural defects, we find that Washington has failed to establish a claim for habeas corpus relief. He alleges that the indictment was defective and therefore the trial court "was without jurisdiction" to sentence him to a three-year mandatory term of imprisonment. The sentencing court, the Summit County Court of Common Pleas, had jurisdiction over Washington's case under R.C. 2931.03, which gives the courts of common pleas jurisdiction over criminal cases. Despite Washington's attempts to couch the error as "jurisdictional," errors in the indictment or in the sentencing are not jurisdictional and are not cognizable in habeas corpus. *Malone v. Lane*, 96 Ohio St.3d 415, 2002-Ohio-4908, 775 N.E.2d 527 (challenges to the validity or sufficiency of the indictment are not cognizable in habeas corpus); *Majoros v. Collins*, 64 Ohio St.3d 442, 443, 596 N.E.2d 1038 (1992)("We have consistently held that sentencing errors are not jurisdictional and

are not cognizable in habeas corpus.”).

{¶12} Washington had an adequate remedy to challenge his criminal sentence through a direct appeal and pursued this remedy twice. Habeas corpus is not a substitute for appeal. *Cornell v. Schotten*, 69 Ohio St.3d 466, 1994-Ohio-74, 633 N.E.2d 1111 (“We have long held that habeas corpus will not be substituted for appeal or post-conviction relief.”).

{¶13} Additionally, this is Washington’s sixth state habeas corpus petition. He either raised or could have raised any of his claims in a previous habeas corpus case. See *Hazel v. Knab*, 130 Ohio St.3d 22, 955 N.E.2d 378, 2011 -Ohio- 4608 (res judicata bars successive habeas corpus petitions).

III.

{¶14} Washington’s habeas corpus petition was not notarized as required by R.C. 2725.04, the affidavit listing his civil lawsuits and appeals for the preceding five years was not notarized as required by R.C. 2969.25(A), and he failed to include an inmate account statement for each of the six months immediately preceding his petition filing date as required by R.C. 2969.25(C)(1). Thus, his habeas corpus petition suffers from multiple fatally defective procedural errors. Additionally, the alleged sentencing error is not jurisdictional and not cognizable in habeas corpus. Finally, this sixth habeas corpus petition is barred by res judicata. Thus, we hereby **DISMISS** his habeas corpus petition under Civ. R. 12(B)(6). We **GRANT** the Respondent’s motion to dismiss appeal on both procedural and substantive grounds. All other pending motions are **DENIED** as **MOOT**.

{¶15} The clerk shall serve a copy of this order on all counsel of record at their last known addresses. The clerk shall serve petitioner by certified mail, return receipt requested. If returned unserved, the clerk shall serve petitioner by ordinary mail.

PETITION DISMISSED. COSTS TO PETITIONER. SO ORDERED.

Abele, P. J. & McFarland, J.: Concur.

FOR THE COURT

Marie Hoover
Administrative Judge