

[Cite as *Rickard v. Buchanan*, 2015-Ohio-1367.]

STATE OF OHIO, NOBLE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

JOSEPH RICKARD,

)

)

PETITIONER-APPELLANT,

)

)

CASE NO. 14 NO 422

V.

)

)

OPINION

N.C.I. WARDEN, TIMOTHY BUCHANAN,

)

)

RESPONDENT-APPELLEE.

)

CHARACTER OF PROCEEDINGS:

Civil Appeal from Court of Common
Pleas of Noble County, Ohio
Case No. 214-0035

JUDGMENT:

Affirmed

APPEARANCES:

For Respondent-Appellee

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Ohio Attorney General
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For Petitioner-Appellant

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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: March 31, 2015

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DONOFRIO, J.

{¶1} Petitioner-appellant, Joseph Rickard, appeals from a Noble County Common Pleas Court judgment dismissing his application for a writ of habeas corpus.

{¶2} Appellant was convicted of the 1992 murder of Vernon Huggins. He appealed. The Sixth District Court of Appeals affirmed his conviction. *State v. Rickard*, 6th Dist. No. L-93-205, 1994 WL 110830 (Mar. 31, 1994).

{¶3} Appellant filed two petitions for postconviction relief, which were both denied. *State v. Rickard*, No. L-95-144, 1995 WL 738882 (Dec. 15, 1995); *State v. Rickard*, 122 Ohio App. 3d 185, 701 N.E.2d 437 (1997).

{¶4} Appellant then filed a habeas corpus petition in federal court, which was also denied. *Rickard v. Jeffrey Wolfe, Warden*, N.D. Ohio No. 3:06-CV-2753, 2007 WL 4526522 (Dec. 17, 2007).

{¶5} Appellant filed the application for a writ of habeas corpus that is the subject of this appeal on March 27, 2014. In this application, appellant asserted that his conviction was void because it resulted from an indictment that was not signed by the grand jury and his counsel was ineffective for failing to raise this issue. Appellant requested a “fact finding” hearing. Appellant also requested appointed counsel.

{¶6} Respondent-appellee, Warden Tim Buchanan, filed a Civ.R. 12(B)(6) motion to dismiss and motion for summary judgment asserting the application did not meet the statutory filing requirements, did not state a cognizable claim for habeas relief, and the doctrine of res judicata barred the claim.

{¶7} The trial court found that appellant’s application was facially defective, citing the reasons set forth in appellee’s motion to dismiss. Therefore, the trial court denied appellant’s habeas corpus application.

{¶8} Appellant filed a timely notice of appeal on August 4, 2014.

{¶9} Appellant raises four assignments of error. His first two assignments of error raise the same argument. Therefore, we will address them together. They state:

THE TRIAL COURT ERRED TO THE HARM AND PREJUDICE

OF THE PETITIONER-APPELLANT AND VIOLATED HIS DUE PROCESS AND EQUAL PROTECTION RIGHTS WHEN IT DENIED AND DISMISSED HIS APPLICATION FOR WRIT OF HABEAS CORPUS WITH PREJUDICE, FOR THE REASONS SET FORTH IN RESPONDENT'S APPELLEE'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT, (WITHOUT STATING WHICH REASON).

THAT THE TRIAL COURT'S DENIAL/DISMISSAL HARMS AND PREJUDICES THE APPELLANT AS THE COURT FAILED TO STATE WHICH REASON OR THE GROUNDS FOR THE DISMISSAL.

{¶10} Appellant argues in these two assignments of error that the trial court should have specifically stated the grounds on which it granted appellee's motion to dismiss.

{¶11} The trial court found that the application was facially defective and dismissed the application accordingly. In support, the court stated it was relying on the reasons cited by appellee in the motion to dismiss.

{¶12} The reasons for finding the application facially defective, as set forth by appellee, were three-fold. First, the application was not properly verified because appellant never expressly swore to the truth of the facts contained in his application as required by R.C. 2725.04. Second, appellant failed to attach the requisite prior civil action affidavit. Third, appellant failed to pay the filing fee or, alternatively, to file a proper fee waiver request.

{¶13} The trial court specifically stated that it dismissed the application due to the deficiencies set forth by appellee. Appellee set forth the above cited three deficiencies. The trial court's language implies that it relied on all three deficiencies. The court was under no obligation to restate these deficiencies in its judgment entry.

{¶14} Accordingly, appellant's first and second assignments of error are without merit.

{¶15} Appellant's third assignment of error states:

THE TRIAL COURT ERRED AND VIOLATED DUE PROCESS RIGHTS OF THE PETITIONER WHEN IT DENIED AND DISMISSED HIS WRIT OF HABEAS CORPUS, THAT HAD MERIT AND COULD BE PROVEN, WITH PREJUDICE, AND FOR THE REASONS PRESENTED BY RESPONDENT, AS THE APPLICATION AND WRIT WERE NOT FATALLY DEFECTIVE ON ITS FACE.

{¶16} Appellant argues that we should grant him leniency because he is proceeding pro se. He asserts that because his application has merit, any procedural deficiencies should be overlooked. He goes on to argue that his application meets all statutory requirements.

{¶17} We review a trial court's judgment granting a Civ.R. 12(B)(6) motion to dismiss de novo. *Harman v. Chance*, 7th Dist. No. 99 CA 119, 2000-Ohio-2605.

{¶18} R.C. 2725.04 provides that an

[a]pplication for the writ of habeas corpus shall be by petition, signed and verified either by the party for whose relief it is intended, or by some person for him, and shall specify:

(A) That the person in whose behalf the application is made is imprisoned, or restrained of his liberty;

(B) The officer, or name of the person by whom the prisoner is so confined or restrained; or, if both are unknown or uncertain, such officer or person may be described by an assumed appellation and the person who is served with the writ is deemed the person intended;

(C) The place where the prisoner is so imprisoned or restrained, if known;

(D) A copy of the commitment or cause of detention of such person shall be exhibited, if it can be procured without impairing the efficiency of the remedy; or, if the imprisonment or detention is without legal authority, such fact must appear.

{¶19} The failure to comply with the verification requirement is grounds for dismissal. *Sidle v. Ohio Adult Parole Auth.*, 89 Ohio St. 3d 520, 2000-Ohio-237, 733 N.E.2d 1115; *Russell v. Mitchell*, 84 Ohio St. 3d 328, 329, 1999-Ohio-489, 703 N.E.2d 1249. “‘Verification’ means a ‘formal declaration made in the presence of an authorized officer, such as a notary public, by which one swears to the truth of the statements in the document.’” *Chari v. Vore*, 91 Ohio St. 3d 323, 327, 2001-Ohio-49, 744 N.E.2d 763, quoting Garner, Black’s Law Dictionary (7 Ed.1999) 1556.

{¶20} Appellant’s application is not verified. Along with his application, appellant also filed an affidavit of indigency and an affidavit of prior civil filings, which are notarized. But his actual application for a writ of habeas corpus is not. Thus, the application fails to meet the statutory verification requirement. This was a basis for dismissal.

{¶21} R.C. 2969.25(A) 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. The affidavit shall include all of the following for each of those civil actions or appeals:

- (1) A brief description of the nature of the civil action or appeal;
- (2) The case name, case number, and the court in which the civil action or appeal was brought;
- (3) The name of each party to the civil action or appeal;
- (4) The outcome of the civil action or appeal, * * *.

{¶22} The failure to comply with R.C. 2969.25’s requirements is grounds for dismissal of an application for habeas corpus. *State ex rel. Zanders v. Ohio Parole Bd.*, 82 Ohio St. 3d 421, 422, 1998-Ohio-218, 696 N.E.2d 594.

{¶23} The same day he filed his application for habeas corpus, appellant filed

a notarized affidavit listing his prior court filings in the past five years and averring that he did not file any other actions in any other court in the past five years. This affidavit complies with R.C. 2969.25(A). Therefore, this was not a basis for dismissal.

{¶24} R.C. 2969.25(C) provides:

(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.

{¶25} Although a petitioner files an affidavit of indigency and seeks waiver of prepayment of the court's filing fees, if he fails to include in his affidavit of indigency a statement setting forth the balance in his inmate account for each of the preceding six months, as certified by the institutional cashier, then his action is subject to dismissal. *Hazel v. Knab*, 130 Ohio St. 3d 22, 2011-Ohio-4608, 955 N.E.2d 378, ¶1.

{¶26} In this case, appellant filed a motion to waive prepayment of filing fees and costs. He also filed an affidavit of indigency setting forth his account balance as of a certain date.

{¶27} But appellant did not file an inmate account statement listing his inmate account balance for each of the preceding six months as required by R.C. 2969.25(C). Thus, this was grounds for dismissal.

{¶28} In sum, the trial court properly dismissed appellant's application for

habeas corpus relief because the application did not meet the verification requirement of R.C. 2725.04 and because it did not meet the inmate account six-month balance requirement of R.C. 2969.25(C). Even though appellant's application did meet the reporting of civil actions requirement of R.C. 2969.25(A), the trial court had at least two other grounds on which to properly dismiss the application.

{¶29} Moreover, even if appellant's application was not facially defective, he still would not be entitled to habeas relief. Appellant's application alleges an invalid indictment and ineffective assistance of counsel. Habeas corpus is not available to challenge either the validity or the sufficiency of an indictment because the petitioner possessed an adequate remedy by direct appeal to raise these contentions. *Luna v. Russell*, 70 Ohio St. 3d 561, 562, 1994-Ohio-264, 639 N.E.2d 1168. Likewise, a claim of ineffective assistance of counsel is not cognizable in habeas corpus. *Davis v. Wilson*, 100 Ohio St. 3d 269, 2003-Ohio-5898, 798 N.E.2d 379, ¶9.

{¶30} Accordingly, appellant's third assignment of error is without merit.

{¶31} Appellant's fourth assignment of error states:

THE TRIAL COURT ERRED, VIOLATED DUE PROCESS AND EQUAL PROTECTION IN CONDUCTING THE FACT-FINDING HEARING, WITHOUT APPOINTING COUNSEL AND BRING PETITIONER TO SAID HEARING, AND GRANTING THE RESPONDENT'S MOTION TO DISMISS.

{¶32} Here appellant argues the trial court should have appointed him counsel and held a fact-finding hearing before ruling on his application.

{¶33} The trial court was not required to hold an evidentiary hearing with appellant's attendance on his habeas corpus application. Even when a court grants a habeas writ, an evidentiary hearing and the physical presence of the petitioner are not always required. *Waites v. Gansheimer*, 110 Ohio St. 3d 250, 2006-Ohio-4358, 852 N.E.2d 1204, ¶8, citing *Chari v. Vore*, 91 Ohio St.3d 323, 327, 744 N.E.2d 763 (2001).

{¶34} Moreover, no hearing is required when the petition is facially defective and fails to state a claim cognizable in habeas corpus. *Id.* And as stated above, appellant's application is both facially defective and fails to set forth any basis for habeas corpus relief as neither an invalid indictment nor ineffective assistance of counsel are grounds for habeas relief.

{¶35} Accordingly, appellant's fourth assignment of error is without merit.

{¶36} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.