

[Cite as *State ex rel. Sands v. Lake Cty. Common Pleas Court*, 172 Ohio St.3d 146, 2023-Ohio-2599.]

**THE STATE EX REL. SANDS, APPELLANT, v. LAKE COUNTY COMMON PLEAS
COURT ET AL., APPELLEES.**

**[Cite as *State ex rel. Sands v. Lake Cty. Common Pleas Court*, 172 Ohio St.3d
146, 2023-Ohio-2599.]**

Habeas corpus—Petitioner failed to comply with requirements of R.C.
2969.25(C)—Court of appeals’ judgment dismissing petition affirmed.

(No. 2022-1518—Submitted May 2, 2023—Decided August 2, 2023.)

APPEAL from the Court of Appeals for Marion County, No. 9-22-36.

Per Curiam.

{¶ 1} Appellant, Joseph A. Sands, appeals the Third District Court of Appeals’ judgment dismissing his petition for a writ of habeas corpus. Because Sands failed to comply with R.C. 2969.25(C) when he submitted his petition, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

{¶ 2} In 2006, a Lake County jury found Sands guilty on multiple felony counts. Sands is serving an aggregate 20-year prison sentence and is currently incarcerated at the Marion Correctional Institution.

{¶ 3} Sands filed a petition for a writ of habeas corpus in the Third District in June 2022, naming appellees, Warden Harold May and the Lake County Court of Common Pleas, as respondents. Sands alleged that he was entitled to immediate release on the basis that his “lawful (10) year prison term expired” on or about April 6, 2016. Sands contended that his additional, consecutive ten-year sentence was invalid because it was imposed for a count on which the jury had acquitted him.

{¶ 4} The common pleas court filed a motion to dismiss or, in the alternative, for summary judgment, and the warden filed a separate motion to

dismiss. Sands opposed both motions. The court of appeals dismissed the common pleas court from the case on the basis that it was an improper respondent in a habeas corpus action. Additionally, the court granted the warden’s motion to dismiss on three grounds. First, it found that Sands failed to comply with R.C. 2969.25(C) because he did not submit with his petition a statement of his inmate account and a certified statement by the prison cashier. Second, it found that Sands’s habeas claim was without merit because he was alleging a nonjurisdictional sentencing error for which he had an adequate remedy in the ordinary course of the law. Finally, it found that Sands’s claim was barred by *res judicata* because it was submitted in a successive habeas petition.

{¶ 5} Sands appealed to this court as of right.

ANALYSIS

{¶ 6} This court reviews *de novo* a court of appeals’ Civ.R. 12(B)(6) dismissal of a habeas corpus petition. *State ex rel. Norris v. Wainwright*, 158 Ohio St.3d 20, 2019-Ohio-4138, 139 N.E.3d 867, ¶ 5. Dismissal is appropriate when it appears beyond doubt, taking all factual allegations in the petition as true, that the petitioner can prove no set of facts entitling him to a writ of habeas corpus. *Orr v. Schweitzer*, 165 Ohio St.3d 175, 2021-Ohio-1786, 176 N.E.3d 738, ¶ 4.

{¶ 7} Sands sought a waiver of the court of appeals’ fee for instituting an original action. When an inmate seeks a waiver of a court of appeals’ filing fees for commencing a civil action against a governmental entity or employee, he must file with his complaint or petition an affidavit stating that he is seeking a waiver of the prepayment of the court’s full filing fees and an affidavit of indigency. R.C. 2969.25(C). The affidavit must contain (1) a statement certified by the institutional cashier that sets forth the balance of the inmate’s institutional account for each of the preceding six months and (2) a statement that sets forth all other cash and things of value owned by the inmate. *Id.* Noncompliance with these requirements is a

proper basis for dismissal of the action. *State ex rel. Ellis v. Wainwright*, 157 Ohio St.3d 279, 2019-Ohio-2853, 135 N.E.3d 761, ¶ 6.

{¶ 8} In this case, the record shows that Sands did not comply with R.C. 2969.25(C). The affidavit filed with his petition did not include a statement of the balance of his institutional account for each of the preceding six months. Sands attached a compliant affidavit to his memorandum in response to the warden’s motion to dismiss filed later in the proceeding below, but an inmate cannot cure noncompliance with R.C. 2969.25(C) by amendment after a petition is filed, *see State ex rel. Evans v. McGrath*, 151 Ohio St.3d 345, 2017-Ohio-8290, 88 N.E.3d 957, ¶ 7.

{¶ 9} Sands disputes the facts in the record, contending that his R.C. 2969.25(C) affidavit was, in fact, filed with his petition but was not contained in the record certified to this court by the clerk of courts. Sands attached to his brief filed in this court an affidavit from a person named Vicky Parker, which states that she contacted the court-of-appeals clerk’s office on Sands’s behalf on August 19, 2022, and was told that Sands’s R.C. 2969.25(C) affidavit “was attached to the [prepayment] Waiver and was part of the original filing on June 27, 2022,” but was “considered confidential information and is never downloaded for access or viewing by the public.”

{¶ 10} Parker’s affidavit is not properly before us. Putting aside the obvious hearsay concerns, “[a] reviewing court cannot add matter to the record before it, which was not a part of the [lower] court’s proceedings, and then decide the appeal on the basis of the new matter,” *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus. If Sands thought that the record below was incorrect, he could have requested that we direct the court of appeals to certify and transmit a supplemental record. *See S.Ct.Prac.R. 15.08.*

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{¶ 11} The court of appeals did not err in finding Sands’s noncompliance with R.C. 2969.25(C) to be a basis for dismissal. We therefore need not reach the issue whether Sands’s petition stated a valid claim for relief in habeas corpus.

CONCLUSION

{¶ 12} Because Sands did not comply with R.C. 2969.25(C), we affirm the judgment of the Third District Court of Appeals.

Judgment affirmed.

KENNEDY, C.J., and FISCHER, DEWINE, DONNELLY, STEWART, and DETERS, JJ., concur.

BRUNNER, J., concurs in judgment only.

Joseph A. Sands, pro se.

Dave Yost, Attorney General, and Lisa K. Browning, Assistant Attorney General, for appellee Warden Harold May.

Charles E. Coulson, Lake County Prosecuting Attorney, and Kelly A. Echols, Assistant Prosecuting Attorney, for appellee Lake County Common Pleas Court.
