

**IN THE COURT OF APPEALS OF OHIO**

SEVENTH APPELLATE DISTRICT  
NOBLE COUNTY

THE STATE OF OHIO ON THE RELATION OF  
DONALD L. MISSIMER, JR.,

Petitioner,

v.

JAY FORSHEY, WARDEN

Respondent.

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**OPINION AND JUDGMENT ENTRY**  
**Case No. 22 NO 0495**

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Writ of Habeas Corpus

**BEFORE:**

Gene Donofrio, Cheryl L. Waite, David A. D'Apolito, Judges.

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**JUDGMENT:**

Dismissed.

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*Donald L. Missimer, Jr.*, Pro Se, Noble Correctional Institution, 15708 McConnellsville Road, Caldwell, Ohio 43724, Petitioner and

*Atty. Dave Yost*, Ohio Attorney General and *Atty. Maura O'Neill Jaite*, Senior Assistant Attorney General, Ohio Attorney General's Office, 30 East Broad Street, 23rd Floor, Columbus, Ohio 43215, for Respondent.

Dated:  
December 16, 2022

**PER CURIAM.**

{¶1} Petitioner Donald L. Missimer, Jr. has commenced this original action by filing a pro se verified petition for a writ of habeas corpus seeking his immediate release from the Noble Correctional Institution in Caldwell, Ohio. Missimer argues the sentencing court “lacked [the] requisite legal authority and/or judicial power to render” the prison term of 3-15 years it imposed on him following his guilty plea to burglary in 1992. The petition names the warden, Jay Forshey, as respondent. Counsel for the warden has filed a motion to dismiss or, in the alternative, a motion for summary judgment, highlighting Missimer’s failure to include all of the commitment papers relevant to his present incarceration. The warden also contends Missimer’s claim is not cognizable in habeas and that Missimer is not entitled to immediate release because he has not completed the maximum term of his sentence.

{¶2} The facts pertinent to this original action are gleaned from Missimer’s petition and the two exhibits he included. Exhibit 1 is an indictment from the April 9, 1992 term of the Licking County Grand Jury charging Missimer with burglary in violation of R.C. 2911.12. Exhibit 2 is a September 16, 1992 judgment entry issued by the Licking County Common Pleas Court in case number 92CR121S, sentencing Missimer to a minimum term of 3 years and a maximum term of 15 years in prison after he pleaded guilty to burglary as charged.

{¶3} Exhibit 2 is consistent with Missimer’s statement in his petition that he was sentenced to prison for an indefinite term of 3 to 15 years after pleading guilty to burglary in 1992. However, Missimer explains a cycle of parole, re-offense, and reimprisonment that occurred after he served only a portion of that sentence.

{¶4} Seven years later, in 1999, Missimer relates that he was paroled in May, rearrested for an unidentified offense in August, and reimprisoned that December. He was paroled again in December 2000 and indicted less than two months later, in February 2001, for passing bad checks. He was sentenced to a 10-month “determinate” sentence and reimprisoned in March 2001.

{¶5} He was released on parole again in April 2003, reimprisoned in December 2003 for failing to report to his parole officer, and then released to a halfway house in January 2004. According to Missimer, he “left” the halfway house to serve a 17-year

prison sentence for an unidentified offense in New York and was reimprisoned in Ohio in June 2021.

{¶6} In his petition, Missimer argues he has served more than three years beyond the maximum term authorized for the burglary offense for which he was indicted. More specifically, Missimer contends that his indictment only set forth the elements to meet the definition of third-degree-felony burglary rather than the second-degree-felony burglary for which the trial court sentenced him.

{¶7} R.C. 2725.01 spells out the availability of habeas corpus relief: “Whoever is unlawfully restrained of his liberty, or entitled to the custody of another, of which custody such person is unlawfully deprived, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment, restraint, or deprivation.” R.C. 2725.04 lists the required contents of a petition for a writ of habeas corpus. Of particular importance here is the requirement that the petitioner includes all pertinent commitment papers relevant to the arguments they are raising in the petition:

Application 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:

\* \* \*

(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.

To comply with this rule, a petitioner must attach all pertinent papers regarding his commitment, including sentencing entries and parole-revocation decisions. *State ex rel. Cannon v. Mohr*, 155 Ohio St.3d 213, 2018-Ohio-4184, 120 N.E.3d 776, ¶ 6. A petition that fails to comply with this requirement is defective and requires dismissal. *Farley v. Wainwright*, 164 Ohio St.3d 441, 2021-Ohio-670, 173 N.E.3d 468, ¶ 6.

{¶8} The Ohio Supreme Court has acknowledged the necessity and importance of these papers, explaining:

These commitment papers are necessary for a complete understanding of the petition. Without them, the petition is fatally defective. When a petition is presented to a court that does not comply with R.C. 2725.04(D), there is no showing of how the commitment was procured and there is nothing before the court on which to make a determined judgment except, of course, the bare allegations of petitioner's application.

*Bloss v. Rogers*, 65 Ohio St.3d 145, 146, 602 N.E.2d 602 (1992).

{¶9} Here, Missimer has not included all of the commitment papers necessary for a complete understanding of the petition. For instance, Missimer's Exhibit 2, the Licking County Common Pleas Court September 16, 1992 Judgment Entry sentencing him to 3 to 15 years for burglary in case number 92CR121S, also ordered that sentence to run consecutively with the sentences in case number 92CR240. Yet, Missimer's petition makes no mention of that case and, more importantly, does not include the related commitment papers.

{¶10} Habeas corpus is generally available only when the petitioner's maximum sentence has expired and they are entitled to immediate release from prison. *State ex rel. Holman v. Collins*, 159 Ohio St.3d 537, 2020-Ohio-874, 152 N.E.3d 238, ¶¶ 8-9. Leaving aside the absence of any information relating to his sentences for case number 92CR240, Missimer could not have served his maximum sentence when he was paroled in 1999. By his own admission, Missimer reoffended in August 1999 and February 2001, violated parole in April 2003, and served a 17-year sentence in New York. Missimer's petition does not include commitment papers related to those events. In instances such as this, the Ohio Supreme Court has emphasized that "*all* commitment papers are necessary for a complete understanding of the petition." (Emphasis sic.) *State ex rel. Davis v. Sheldon*, Slip Opinion No. 2022-Ohio-2789.

{¶11} Therefore, Missimer's failure to comply with R.C. 2725.04(D)'s commitment-papers requirement alone is cause to dismiss the petition. But even if we could reach the merits of Missimer's habeas claim, it would still require dismissal.

{¶12} The Licking County Grand Jury indicted Missimer on April 9, 1992 for burglary in violation of R.C. 2911.12. However, the indictment does not specify which

division of R.C. 2911.12 Missimer was indicted for or specify which felony degree of burglary.

{¶13} Because the indictment did not identify which division of R.C. 2911.12 Missimer was being charged with, he contends that comparing the elements in his indictment with those listed in the statute shows the trial court had only enough jurisdiction to sentence him for the third-degree-felony version of burglary rather than the second-degree-felony version of burglary. In 1992, that meant the difference between an indefinite term of imprisonment of 3, 4, 5, 6, 7, or 8 years to 15 years, R.C. 2929.11(B)(2)(a) (second-degree felony) and 2, 3, 4, or 5 years to 10 years, R.C. 2929.11(B)(2)(a) (third-degree).

{¶14} Under the burglary statute, R.C. 2911.12, as quoted by Missimer, the element that elevated burglary from a third-degree-felony burglary to a second-degree burglary was if the offender trespassed when “any person is present or likely to be present.” However, that element was not in the 1992 version of the statute. The General Assembly did not add it until four years after Missimer’s conviction in 1996.

{¶15} The language of the version of the statute in effect when Missimer was convicted in 1992 tracks with the language in his indictment and his conviction for second-degree-felony burglary. R.C. 2911.12(A) provided, in relevant part: “No person, by force, stealth, or deception, shall do any of the following: (1) Trespass in an occupied structure or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense or any felony \* \* \*.”

{¶16} Missimer’s indictment reads:

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that Donald L. Missimer, Jr. on the 3rd day of April, 1992, at the County of Licking, aforesaid did *by force, stealth or deception, trespass* in the Mike Foran residence located at 11693 Eddyburg Road, Newark, Ohio, *an occupied structure*, defined in Section 2909.01 of the Revised Code, *or in a separately secured or separately occupied portion thereof, with purpose to commit therein, a theft offense*, as

defined in Section 2913.01 of the Ohio Revised Code, *or any felony*, in violation of Section 2911.12 of the Ohio Revised Code.

(Emphasis added.)

**{¶17}** Accordingly, in consideration of the foregoing and upon consideration of the warden’s motion to dismiss, IT IS ORDERED by the court that said motion be, and the same is hereby, GRANTED, the writ is DENIED, and this original action DISMISSED.

**{¶18}** IT IS FURTHER ORDERED by the court, pursuant to Civ.R. 58, that the Clerk of the Noble County Court of Appeals shall immediately serve upon all parties (including unrepresented or self-represented parties) notice of this judgment and its date of entry upon the journal. Costs taxed to Missimer.

**JUDGE GENE DONOFRIO**

**JUDGE CHERYL L. WAITE**

**JUDGE DAVID A. D’APOLITO**