

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2014 IL App (4th) 140077-U

NO. 4-14-0077

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

September 4, 2014

Carla Bender

4th District Appellate

Court, IL

MILTON SMITH,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Livingston County
RANDY PFISTER, Warden,)	No. 13MR52
Defendant-Appellee.)	
)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Appleton and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in granting defendant's motion to dismiss plaintiff's petition for *habeas corpus* or denying his motion for the appointment of counsel.

¶ 2 In April 2013, plaintiff, Milton Smith, an inmate at Pontiac Correctional Center (Pontiac), filed a *pro se* petition for *habeas corpus* relief against defendant, Randy Pfister, the warden at Pontiac. In June 2013, defendant filed a motion to dismiss. In August 2013, plaintiff filed a reply, seeking leave to amend his petition. In January 2014, the trial court granted the motion to dismiss.

¶ 3 On appeal, plaintiff argues the trial court erred in (1) denying his petition for *habeas corpus* relief, (2) not ruling on his motion for leave to amend, and (3) denying his motion for the appointment of counsel. We affirm.

¶ 4 I. BACKGROUND

¶ 5 Plaintiff has been a resident of the Department of Corrections (DOC) since April 28, 1983, having received a 60-year sentence for two counts of first degree murder. He was initially projected to be eligible for mandatory supervised release (MSR) on April 28, 2013. However, because plaintiff lost good-time credits due to disciplinary infractions, his projected eligibility date to begin MSR had been recalculated to September 23, 2019.

¶ 6 In April 2013, plaintiff filed a *pro se* petition for *habeas corpus* relief, alleging he had completed educational programs in prison from 2002 to 2008. He claimed he was entitled to educational good-time credit for his participation in those programs and those credits would offset any credit previously lost through disciplinary actions. Plaintiff also filed a motion for appointment of counsel and attached several grievances regarding his claims that DOC personnel wrongfully took his legal books and papers.

¶ 7 In June 2013, defendant filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-615 (West 2012)), arguing plaintiff failed to state a claim on which *habeas* relief could be granted. In part, defendant argued plaintiff was not entitled to *habeas* relief because he would still be on MSR even if he were correct regarding DOC's errors in calculating his credit.

¶ 8 In August 2013, plaintiff filed a response. Plaintiff claimed that even if he improperly sought *habeas* relief, the trial court should allow him to amend his petition to seek a writ of *mandamus* or, in the alternative, a supervisory order to compel the court to award him the full amount of educational credits he allegedly earned. Plaintiff also filed a motion for appointment of counsel.

¶ 9 In January 2014, the trial court found plaintiff was not entitled to *habeas* relief and granted defendant's motion to dismiss. This appeal followed.

¶ 10

II. ANALYSIS

¶ 11

A. Standard of Review

¶ 12 In the case *sub judice*, the trial court granted defendant's motion to dismiss under section 2-615. A motion to dismiss under section 2-615 of the Procedure Code challenges only the legal sufficiency of the complaint. *Schloss v. Jumper*, 2014 IL App (4th) 121086, ¶ 20, 11 N.E.3d 57. In ruling on a section 2-615 motion to dismiss, "the question is 'whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted.'" *Green v. Rogers*, 234 Ill. 2d 478, 491, 917 N.E.2d 450, 458-59 (2009) (quoting *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81, 806 N.E.2d 632, 634 (2004)). The trial court should not grant a motion to dismiss "unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief." *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 161, 920 N.E.2d 220, 223 (2009). We review a dismissal pursuant to section 2-615 *de novo*. *Beacham v. Walker*, 231 Ill. 2d 51, 57, 896 N.E.2d 327, 331 (2008).

¶ 13

B. Habeas Corpus

¶ 14 Section 10-124 of the Procedure Code (735 ILCS 5/10-124 (West 2012)) sets forth the grounds upon which *habeas* relief is available.

"It is well established that an order of *habeas corpus* is available only to obtain the release of a prisoner who has been incarcerated under a judgment of a court that lacked jurisdiction of the subject matter or the person of the petitioner, or where there has been some occurrence subsequent to the prisoner's conviction that

entitles him to release." *Beacham*, 231 Ill. 2d at 58, 896 N.E.2d at 332.

¶ 15 A petition for writ of *habeas corpus* for nonjurisdictional defects is inappropriate even though the petition alleges errors involving a denial of constitutional rights. *Barney v. Prisoner Review Board*, 184 Ill. 2d 428, 430, 704 N.E.2d 350, 351 (1998); see also *Baker v. Department of Corrections*, 106 Ill. 2d 100, 106, 477 N.E.2d 686, 689 (1985) (noting a *habeas* petition is not a substitute for a direct appeal and "may not be utilized to correct mere judicial error"). "Consequently, where the original judgment of conviction is not void, a prisoner's maximum term has not yet expired, and nothing has occurred to warrant a prisoner's immediate discharge, the trial court is without jurisdiction to grant *habeas corpus* relief." *Faircloth v. Sternes*, 367 Ill. App. 3d 123, 125, 853 N.E.2d 878, 881 (2006). The only remedy available under *habeas corpus* is a prisoner's immediate release from custody. *Adcock v. Snyder*, 345 Ill. App. 3d 1095, 1098, 804 N.E.2d 141, 143 (2004).

¶ 16 In the case *sub judice*, plaintiff alleged he was entitled to educational good-time credit that defendant failed to award him. He claimed he was scheduled to begin his MSR term on April 28, 2013. However, MSR is not considered release for purposes of *habeas corpus*. *Barney*, 184 Ill. 2d at 430-31, 704 N.E.2d at 351 (noting a person on MSR remains in DOC custody until the MSR term expires and *habeas* relief is not available to a petitioner serving an MSR term); see also *Newsome v. Hughes*, 131 Ill. App. 3d 872, 875, 476 N.E.2d 478, 481 (1985). As plaintiff only claimed he was entitled to be serving his MSR term, *habeas* relief was inappropriate.

¶ 17 C. Motion To Amend

¶ 18 In response to defendant's motion to dismiss, plaintiff, as he does now on appeal,

argued he should be allowed to amend his petition to request *mandamus* relief or a supervisory order. We find it inappropriate to analyze the merits of this claim. Plaintiff filed a petition for *habeas corpus* relief, which the trial court ruled upon by granting defendant's motion to dismiss. However, the court did not issue a ruling on any motion to amend, and plaintiff did not seek a ruling from the court on that issue before filing his notice of appeal. Moreover, plaintiff's notice of appeal indicates it was an appeal from the denial of a petition for writ of *habeas corpus*. Thus, we find plaintiff has abandoned his motion to amend and will not address the merits. See *Rodriguez v. Illinois Prisoner Review Board*, 376 Ill. App. 3d 429, 433, 876 N.E.2d 659, 663 (2007) (stating "it is the responsibility of the party filing a motion to request the trial judge to rule on it, and when no ruling has been made on a motion, the motion is presumed to have been abandoned absent circumstances indicating otherwise").

¶ 19 D. Motion for Appointment of Counsel

¶ 20 Plaintiff argues the trial court erred in denying his motion for appointment of counsel. We disagree.

¶ 21 Section 5-105(g) of the Procedure Code (735 ILCS 5/5-105(g) (West 2012)) provides a court with the discretion to appoint counsel to an indigent person. However, "[t]here is no provision in the Habeas Corpus Act (735 ILCS 5/10-101 *et seq.* (West 2002)) for the appointment of counsel, and it is a long-established principle that there is no right to appointed counsel in a *habeas corpus* proceeding due to its civil nature." *Alexander v. Pearson*, 354 Ill. App. 3d 643, 645, 821 N.E.2d 728, 731 (2004); see also *Brewer v. Peters*, 262 Ill. App. 3d 610, 613, 633 N.E.2d 17, 19 (1994) (stating "[a] court has no duty to appoint counsel in a civil action").

¶ 22 Here, plaintiff filed, along with his petition for *habeas corpus* relief, a motion for

appointment of counsel, which the trial court denied. After defendant filed his motion to dismiss, plaintiff filed a reply and again requested the appointment of counsel. The trial court proceeded to ruling on the motion to dismiss. We find no abuse of discretion in the court's decision not to appoint counsel in this civil matter. See *Brewer*, 262 Ill. App. 3d at 613, 633 N.E.2d at 19 (finding the trial court did not abuse its discretion in not ruling on the motions for appointment of counsel and proceeding directly to the motions to dismiss).

¶ 23

III. CONCLUSION

¶ 24

For the reasons stated, we affirm the trial court's judgment.

¶ 25

Affirmed.