[Cite as *Bandy v. Cuyahoga Cty. Prosecutor*, 2018-Ohio-3679.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106635

WILLIE L. BANDY

PLAINTIFF-APPELLANT

vs.

CUYAHOGA COUNTY PROSECUTOR, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-17-885550

BEFORE: Kilbane, P.J., McCormack, J., and Boyle, J.

RELEASED AND JOURNALIZED: September 13, 2018

[Cite as *Bandy v. Cuyahoga Cty. Prosecutor*, 2018-Ohio-3679.]

APPELLANT

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MARY EILEEN KILBANE, P.J.:

{¶1} Plaintiff-appellant, Willie L. Bandy ("Bandy"), pro se, appeals from the trial court's order granting the motions to dismiss of defendants-appellees, the Cuyahoga County prosecutor ("county prosecutor") and the Ohio Adult Parole Authority ("APA") (collectively "the state"). For the reasons set forth below, we affirm.

{¶2} In September 2017, Bandy filed a pro se civil complaint seeking declaratory judgment and injunctive relief. The complaint alleged that the state breached the terms of Bandy's plea agreement in Cuyahoga C.P. No. CR-01-417888 ("the criminal case").

{¶3} In October 2017, the trial court granted Bandy's request to amend his complaint. In the amended complaint, Bandy alleges that in his criminal case, the trial court sentenced him to 15 years to life as a result of his guilty plea to a single count of murder. Bandy further alleges that the trial court "clearly promised [at the plea hearing] that after he completed his minimum sentence in this case _ [Bandy] will be released from prison onto parole."

{¶4} Essentially, Bandy alleges the trial court promised him that upon his completion of 15 years of his indefinite sentence, he would be placed on parole and supervised by the APA for at least 5 years. In support of this contention, Bandy cites in his amended complaint to the following statement by the trial court at the plea hearing in the criminal case:

> THE COURT: It's my understanding that at a minimum, if when you complete your sentence in this case, that you can be supervised by the [APA] for felonies of the first degree. The period of supervision is five

> years. I couldn't find anything in the statute that sets a different time period for murder so I'm going to advise you, sir, that you are going to be supervised for at least a five-year period by the [APA] upon the completion of your sentence. Do you understand that?

{¶5} Bandy argues that "it's clear [from this statement that] the trial court promised [him] that when he completes his minimum sentence [of 15 years that] he would be released onto parole."

{¶6} The amended complaint requests that the trial court in the present case "order the [state] to comply with [Bandy's] plea agreement" and release him from prison to the supervision of the APA because he had recently completed 15 years in prison. The amended complaint further alleges that the APA ignored "the plea agreement conditions, terms, and promise made and ordered by the trial court, when the [APA] continued [Bandy's] agreed to minimum sentence for parole for eight more consecutive years[.]"

{¶7} In November 2017, the county prosecutor and the APA each filed separate motions to dismiss Bandy's amended complaint for failure to state a claim upon which relief could be granted. Bandy did not oppose either motion. In December 2017, the trial court granted both motions, dismissing Bandy's amended complaint in its entirety.

{¶8} It is from this order that Bandy appeals, raising the following two assignments of error for our review.

Assignment of Error One

> The trial court erred in dismissing [Bandy's] declaratory judgment pursuant to Civ.R. 12(B)(6) without ruling on the existing controversy.

Assignment of Error Two

> The trial court erred by dismissing [Bandy's] complaint for declaratory judgment and injunctive relief pursuant to Civ.R. 12(B)(6) when it ignored the plain allegations and request found in the complaint and where a real controversy arose between the parties concerning [Bandy's] contract and/or plea agreement with the state of Ohio for the offense of murder, as well as the Ohio Parole Authority's application of the categories implemented under the offense of murder pursuant to category eleven.

{¶9} In the first and second assignments of error, Bandy argues that the trial court erred in granting the county prosecutor's and the APA's Civ.R. 12(B)(6) motions and dismissing his complaint for declaratory and injunctive relief.

Standard of Review

{¶10} This court applies a de novo standard of review to the trial court's ruling on a motion to dismiss under Civ.R. 12(B)(6) for failure to state a claim. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5, citing *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136. Under this standard of review, we must independently review the record, and we afford no deference to the trial court's decision. *Herakovic v. Catholic Diocese of Cleveland*, 8th Dist. Cuyahoga No. 85467, 2005-Ohio-5985, ¶ 13.

{¶11} In order for a trial court to dismiss a complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief may be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle

the plaintiff to relief. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 11, citing *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975).

{¶12} In resolving a Civ.R. 12(B)(6) motion, a court's factual review is confined to the four corners of the complaint. *McKee v. Univ. Circle, Inc.*, 8th Dist. Cuyahoga No. 102068, 2015-Ohio-2953, ¶ 12. Within those confines, a court must accept as true all material allegations of the complaint and make reasonable inferences in favor of the nonmoving party. *Id*. "'[A]s long as there is there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss.'" *Id.*, quoting *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991).

Bandy's Request for Declaratory and Injunctive Relief

{¶13} Bandy's amended complaint seeks to enforce through a declaratory judgment action what Bandy describes as the trial court's promise in the criminal case "that after [Bandy] has completed his minimum [15-year] sentence[,] he would be released onto parole[.]" Bandy also argues that his plea agreement constitutes a contract for a 15-year sentence.

{¶14} In order to maintain an action for declaratory judgment, a party must demonstrate that a real controversy exists between the parties, that the controversy is justiciable in character, and that speedy relief is necessary to preserve the rights of the parties. *Parham v. McManamon*, 8th Dist. Cuyahoga No. 103679, 2016-Ohio-3264, ¶ 6,

citing *Burger Brewing Co. v. Liquor Control Comm., Dept. of Liquor Control*, 34 Ohio St.2d 93, 97, 296 N.E.2d 261 (1973). "'A trial court may dismiss a complaint for declaratory relief only if no real controversy or justiciable issue exists, or if the declaratory judgment will not terminate the uncertainty or controversy.'" *Id.*, quoting *Reinbolt v. Natl. Fire Ins. Co.*, 158 Ohio App.3d 453, 2004-Ohio-4845, 816 N.E.2d 1083, ¶ 13 (6th Dist.).

{¶15} This court has held that "[a] declaratory judgment action * * * cannot be used as a substitute for a direct appeal or as a collateral attack upon a conviction." *Moore v. Mason*, 8th Dist. Cuyahoga No. 84821, 2005-Ohio-1188, _ 14. "Declaratory relief 'does not provide a means whereby previous judgments of state or federal courts may be reexamined, nor is it a substitute for appeal or [postconviction] remedies.'" *Id.*, quoting *Shannon v. Sequeechi*, 365 F.2d 827, 829 (10th Cir.1966).

{¶16} Indeed, the Ohio Supreme Court has likewise held:

> For direct and collateral attacks alike, declaratory judgment is simply not a part of the criminal appellate or postconviction review process. *Wilson* [*v. Collins*, 10th Dist. Franklin No. 10AP-511, 2010-Ohio-6538,] ¶ 9; [*State v. Brooks*, 133 Ohio App.3d 521, 525-526, 728 N.E.2d 1119 (4th Dist.1999),]; *Moore* at ¶ 14; *Gotel* [*v. Ganshiemer*, 11th Dist. Ashtabula No. 2008-A-0070, 2009-Ohio-5423,] ¶ 44. Ohio's Criminal Rules and statutes provide for the direct review of criminal judgments through appeal, and collateral attacks through postconviction petitions, habeas corpus, and

> motions to vacate. *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 20. A declaratory-judgment action cannot be used as a substitute for any of these remedies. *Clark* [*v. Memolo*, 85 U.S.App.D.C. 65, 174 F.2d 978, 981 (1949)]; *Shannon* at 829; *Wilson* at ¶ 9; *Moore* at ¶ 14; *Gotel* at ¶ 44; *Burge* [*v. Ohio Atty. Gen.*, 10th Dist. Franklin No. 10AP-856, 2011-Ohio-3997,] ¶ 10.

Lingo v. State, 138 Ohio St.3d 427, 2014-Ohio-1052, 7 N.E.3d 1188, ¶ 44.

{¶17} Here, Bandy asks the trial court to reexamine the judgment of the same court in a criminal proceeding that took place over a decade ago. However, "'[n]either, the Declaratory Judgments Act nor Civ.R. 57 convert[s] a claimed error at law by a trial judge acting as a judge in a criminal case into a justiciable controversy between the defendant and the judge subject to resolution by declaration pursuant to the Act." *Carter v. Walters*, 3d Dist. Paulding No. 11-88-24, 1990 Ohio App. LEXIS 1214, *3 (Mar. 22, 1990). Thus, Bandy does not present a justiciable controversy capable of resolution by a declaratory judgment.

{¶18} We note that "habeas corpus, rather than declaratory judgment, is the proper action for persons claiming entitlement to immediate release from prison." *Woodson v. Ohio Adult Parole Auth.*, 10th Dist. Franklin No. 02AP-393, 2002-Ohio-6630, ¶ 10, citing *State ex rel. Finfrock v. Ohio Adult Parole Auth.*, 80 Ohio St.3d 639, 1998-Ohio-655, 687 N.E.2d 761.

{¶19} Ultimately, Bandy appears to have misinterpreted the trial court's advisement of postrelease control as a promise that he would only have to serve 15 years of his indefinite 15-year-to-life sentence. We note that after Bandy served the *minimum* 15 years of this sentence, the APA was vested with the discretion to grant Bandy parole, resulting in his release from prison. *See* R.C. 2967.03. Bandy's 15-year-to-life sentence, however, was not yet complete after he served the minimum 15-year term. "It is the very nature of an indefinite term that an offender may be forced to serve a prison term between the minimum and maximum terms." *State v. Coniglio*, 8th Dist. Cuyahoga No. 84302, 2004-Ohio-6909, ¶ 6. Bandy became eligible for parole after 15 years, but is not entitled to be released on parole because "'Ohio law gives a convicted person no legitimate claim of entitlement to parole prior to the expiration of a valid sentence of imprisonment.'" *Id.*, quoting *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 1994-Ohio-39, 633 N.E.2d 1128.

{¶20} Based on the foregoing, we find the trial court properly granted the county prosecutor's and the APA's Civ.R. 12(B)(6) motions to dismiss because Bandy's complaint seeks relief that the trial court is unable to grant him.

{¶21} Accordingly, the first and second assignments are overruled.

{¶22} Judgment affirmed.

It is ordered that appellees recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

TIM McCORMACK, J., and
MARY J. BOYLE, J., CONCUR