[Cite as *Williams v. Bur. of Sentencing & Computation*, 2019-Ohio-997.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

AGATHA MARTIN WILLIAMS, :

Plaintiff-Appellant, :

No. 107626

v. :

BUREAU OF SENTENCING & COMPUTATION,:

Defendant-Appellee. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: March 21, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-17-889847

Appearances:

Agatha Martin Williams, pro se, *for appellant*

Andrea Kathleen Green Boyd, Thomas E. Madden, and Christine E. Mahy, Office of the Ohio Attorney General, *for appellee*.

MARY EILEEN KILBANE, A.J.:

{¶ 1} Plaintiff-appellant, Agatha Martin Williams ("Williams"), appeals the trial court's decision granting summary judgment in favor of defendant-appellee, the Bureau of Sentence Computation ("BOSCO"). For the reasons set forth below, we affirm.

{¶ 2} In February 2012, Williams was charged by bill of information in Stark County with one count of forgery, four counts of grand theft, and one count of theft. The bill of information alleged that between December 2007 and February 2011, Williams committed the charged offenses against her clients in her capacity as an attorney.

{¶ 3} In February 2012, Williams pled guilty to the charges and the trial court sentenced her to five years of community control, one year of which was to be intensive supervision probation. The trial court also fined Williams $27,500 and ordered her to pay restitution to each of her clients for the amounts stolen. In addition, Williams was not allowed to leave the state as a condition of her probation. Further, the trial court advised Williams that a violation of the community control sanctions would result in a maximum, consecutive prison term totaling 102 months.

{¶ 4} In September 2012, the Ohio Supreme Court Board of Commissioners on Grievances and Discipline held proceedings to determine whether Williams should be permanently disbarred. During the proceedings, Williams was asked when she had last left the state of Ohio. Williams informed the board that approximately a week prior to the hearing she had gone to Pittsburgh, Pennsylvania to gamble. Williams's conduct in leaving the state to gamble violated the terms and conditions of her probation.

{¶ 5} Based upon Williams's testimony before the Board of Commissioners on Grievances and Discipline, the state filed a motion to revoke

her probation. In October 2012, the trial court revoked Williams's probation and sentenced her to consecutive prison terms totaling 102 months.

{¶ 6} Thereafter, Williams appealed the imposed consecutive sentences. In *State v. Williams*, 5th Dist. Stark No. 2013CA00189, 2013-Ohio-3448, the appellate court determined the trial court had failed to find that consecutives sentences were appropriate and supported by the record prior to imposing consecutive sentences. The appellate court remanded the matter to the trial court for the limited purpose of making the required findings under R.C. 2929.14(C)(4). On remand, the trial court made the statutorily required findings and sentenced Williams to a prison term of 102 months.

{¶ 7} In December 2017, Williams filed a petition for declaratory judgment against BOSCO, seeking a declaration that under R.C. 2967.193(D)(5) she was entitled to five days of earned credit for each month of successful participation and completion of educational programming. BOSCO filed a motion to dismiss, which Williams opposed and the trial court denied. Both parties filed respective motions for summary judgment and respective briefs in opposition. In July 2018, the trial court granted BOSCO's motion for summary judgment and denied Williams's motion for summary judgment.

{¶ 8} Williams now appeals, assigning two errors for review:

Assignment of Error One

> The trial court erred as a matter of law in its journal entry of July 31, 2018, granting defendant's motion for summary judgment because a real controversy and material issue of genuine fact still exists between

> the parties, regarding the amount of earned credit [Williams] is rightfully entitled under OAC 5120-2-06(K)(4) and R.C. 2967.193.
>
> Assignment of Error Two
>
> The trial court erred as a matter of law in its July 31, 2018 journal entry granting summary judgment because the affidavit failed to satisfy the requirements of Civ.R. 56(E).

{¶ 9} In the first assignment of error, Williams contends the amount of earned credit she is entitled to under R.C. 2967.19(D)(5) is in dispute. She argues she is entitled to five days rather than the one day the court declared.

{¶ 10} We review an appeal from summary judgment under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996); *Zemcik v. LaPine Truck Sales & Equip. Co.*, 124 Ohio App.3d 581, 585, 706 N.E.2d 860 (8th Dist.1998). In *Zivich v. Mentor Soccer Club,* 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998), the Ohio Supreme Court set forth the appropriate test as follows:

> Pursuant to Civ.R. 56, summary judgment is appropriate when there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264.

{¶ 11} Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific

facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 667 N.E.2d 1197 (1996). Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138 (1992).

{¶ 12} Williams maintains that she was sentenced under House Bill 86 and therefore, under R.C. 2967.193(D)(5), she is entitled to five days of earned credit for each month of successful participation and completion of educational programming.

{¶ 13} In the instant case, there is no dispute that Williams was sentenced under House Bill 86. BOSCO agrees Williams was sentenced under House Bill 86. The record is also clear that the appeals court remanded Williams's case for the trial court to make appropriate findings, before imposing consecutive sentences, required following the enactment of House Bill 86. *Williams*, 2013-Ohio-3448 at 23-25.

{¶ 14} In the trial court's well-reasoned decision, it stated in pertinent part as follows: "The Court declares that Williams was sentenced under H.B. 86, and further declares that Williams is thus entitled to one day of earned credit per month under R.C. 2967.193 and OAC 5120-2-06(J)(4) based upon the dates upon which Williams committed the underlying offenses for which she currently is incarcerated."

{¶ 15} The parties agree that R.C. 2967.193(D)(5) determines the amount of credit to which Williams is entitled. R.C. 2967.193(D)(5) provides:

> Except as provided in division (C) of this section, if the most serious offense for which the offender is confined is a felony of the third, fourth, or fifth degree or an unclassified felony and neither division (D)(2) nor (3) of this section applies to the offender, the offender may earn one day of credit under division (A) of this section if the offender committed that offense prior to September 30, 2011, and the offender may earn five days of credit under division (A) of this section if the offender committed that offense on or after September 30, 2011.

{¶ 16} It is undisputed from the record that the bill of information that charged Williams with one count of forgery, four counts of grand theft, and one count of theft, indicated that the offenses were committed against her client between December 2007 and February 2011. The above statute states: "the offender may earn one day of credit under division (A) of this section if the offender committed that offense prior to September 30, 2011." Therefore, based on the plain reading of the statute, Williams is entitled to one day of earned credit per month, not five days as she contends.

{¶ 17} The interpretation of a statute is an issue of law, which we review de novo. *See, e.g., State v. Vanzandt*, 142 Ohio St.3d 223, 2015-Ohio-236, 28 N.E.3d 1267, ¶ 6. Where, as here, a statute is unambiguous and definite, we must apply the plain meaning of the statute as written. *In re J.Y.*, 8th Dist. Cuyahoga No. 2018-Ohio-2405, citing *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, ¶ 20 ("'An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language[.]'"), quoting *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St. 3d 78, 81, 676 N.E.2d 519 (1997).

{¶ 18} Based on the plain meaning of R.C. 2967.193(D)(5) and the date Williams committed the charged offenses, there is no genuine issue of material fact and BOSCO was entitled to judgment as a matter of law. Therefore the trial court did not err when it granted BOSCO's motion for summary judgment.

{¶ 19} Accordingly, the first assignment of error is overruled.

{¶ 20} In the second assignment of error, Williams argues the affidavit of Barbara Pond ("Pond"), which was attached to BOSCO's motion for summary judgment failed to satisfy Civ.R. 56(E) because Pond expressed an opinion.

{¶ 21} Civ.R. 56(E) sets forth the requirements for affidavits submitted on summary judgment. It provides, in relevant part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit.

{¶ 22} Williams specifically claims Pond's averment that: "[a]s reflected in these records, inmate Williams may earn (1) day of earned credit per month pursuant to R.C. 2967.193(D)(5) because her offenses were committed prior to September 30, 2011," expressed an opinion and violates Civ.R. 56(E).

{¶ 23} We note Williams did not raise this argument below. It is well-settled in Ohio law that a party cannot raise new issues or legal theories for the first time on appeal. *See In re M.D.*, 38 Ohio St.3d 149, 151, 527 N.E.2d 286 (1988); *Mosley v. Cuyahoga Cty. Bd. of Mental Retardation*, 8th Dist. Cuyahoga No. 96070, 2011-Ohio-3072, ¶ 55. Reviewing courts are not required to consider claims the plaintiff

failed to raise in the trial court. *Hudak v. Golubic*, 8th Dist. Cuyahoga No. 106819, 2018-Ohio-4874 ¶ 16, citing *Thomas v. Univ. Hosps. of Cleveland*, 8th Dist. Cuyahoga No. 90550, 2008-Ohio-6471, ¶ 37.

{¶ 24} Nonetheless, as BOSCO aptly counters, we have held that opinion testimony or inference otherwise admissible "is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact." *Graham v. Szuch*, 8 Dist. Cuyahoga No. 100228, 2014-Ohio-1727 ¶ 37, citing *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302, ¶ 29, quoting Evid.R. 704.

{¶ 25} In the first assignment of error, we concluded R.C. 2967.193(D)(5) was unambiguous and that it was undisputed that Williams committed the charged offenses prior to September 30, 2011. Pond's averment, as custodian of the records for the Ohio Department of Rehabilitation and Correction comported with the trial court's ultimate determination and does not amount to a violation of Civ.R. 56(E). Further, based on the unambiguous statute and the lack of dispute regarding the dates Williams committed the charged offenses, Pond's averment that Williams now characterizes as an opinion was harmless.

{¶ 26} Accordingly, the second assignment of error is overruled.

{¶ 27} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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, ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., and
LARRY A. JONES, SR., J., CONCUR