

[Cite as *Wilburn v. Ohio Dept. of Rehab. & Corr.*, 2001-Ohio-4047.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Russell Dean Wilburn,	:	
	:	
Plaintiff-Appellant,	:	No. 01AP-198
	:	
v.	:	
	:	(REGULAR CALENDAR)
Ohio Department of Rehabilitation	:	
and Correction et al.,	:	
	:	
Defendants-Appellees.	:	
	:	

O P I N I O N

Rendered on November 27, 2001

Russell Dean Wilburn, pro se.

*Betty D. Montgomery, Attorney General, Kelley A. Sweeney
and Dawn M. Tarka, for appellees.*

APPEAL from the Franklin County Court of Common Pleas.

KENNEDY, J.

Plaintiff-appellant, Russell Dean Wilburn, is an inmate currently incarcerated at the London Correctional Institution. Appellant entered a plea of guilty to one count of conspiracy to commit aggravated murder and one count of kidnapping. Appellant was

sentenced to a period of incarceration of not less than four years nor more than twenty-five years.

In July 1997, appellant's case manager authored a Sexual Predator Screening Instrument pertaining to an uncharged offense of rape concerning one of the victims of the kidnapping. A hearing was held in the Lawrence County Court of Common Pleas and it was determined that appellant would not be classified as a sexual predator. The court further ordered the Department of Rehabilitation and Corrections to remove their recommendation and findings regarding the sexual predator classification from appellant's institutional record.

Appellant received a parole hearing on March 19, 1998. At that time, it was determined that appellant would not be granted parole. Appellant was placed in Category 13, Risk Score 4 of the guidelines and his next parole hearing was continued until March 2008.

On March 20, 2000, appellant filed a complaint for declaratory judgment and injunctive relief in the Franklin County Court of Common Pleas. Appellant named as defendant, the Ohio Department of Rehabilitation and Correction ("ODRC"). Appellant asserted that the parole board's use of the new guidelines actually imposed a greater sentence on him than the trial court had originally imposed; that the parole board improperly considered the information from the pre-sentence investigation concerning whether the victim of the kidnapping was raped; asserted that ODRC had deliberately and intentionally inflicted emotional distress on him in violation of Section 1983, Title 42, U.S.Code; and requested a new parole hearing.

On May 2, 2000, ODRC filed a motion to dismiss arguing that appellant has no constitutional right to parole; that his complaint failed to state a cognizable claim under Section 1983, Title 42, U.S.Code; that appellant failed to state a claim for violation of the Ohio Constitution; and that appellant had failed to comply with the Ohio's prisoner litigant final requirement.

On July 18, 2000, the trial court granted ODRC's motion to dismiss finding that appellant had failed to set forth the cause of action for declaratory judgment. The court issued a journal entry granting ODRC's motion to dismiss on February 26, 2001.

Appellant filed a notice of appeal in this court asserting the following assignments of error:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY DISMISSING APPELLANT'S COMPLAINT FOR DECLARATORY JUDGMENT PURSUANT TO CIV.R. 12(B)(6) WHEN IT IGNORED THE PLAIN ALLEGATIONS AND REQUESTS FOUND IN THE COMPLAINT, WHERE A REAL CONTROVERSY AROSE BETWEEN PARTIES CONCERNING THE APPLICATION OF NEW PAROLE GUIDELINES WHICH ALTER APPELLANT'S ORIGINAL OFFENSE TO MAKE IT MORE ONEROUS SUBJECTING HIM TO SUBSTANTIALLY INCREASED PUNISHMENT.

SECOND ASSIGNMENT OF ERROR

TRIAL COURT ERRED WHEN IT FAILED TO DETERMINE THAT THE APPELLEE'S "NEW" PAROLE GUIDELINES AS APPLIED TO APPELLANT VIOLATE THE "SEPARATION OF POWERS" DOCTRINE BY EXTENDING APPELLEE'S AUTHORITY BEYOND IT'S SCOPE TO RELEGISLATE STATUTORY OFFENSES AND PUNISHMENTS.

The dismissal of a complaint, pursuant to Civ.R. 12(B)(6), presents a question of law which this court reviews *de novo*. *State ex rel. Drake v. Athens Cty. Bd. of*

Elections (1988), 39 Ohio St.3d 40. In order for a trial court to properly dismiss a complaint pursuant to Civ.R.12(B)(6), it must appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *York v. Ohio State Highway Patrol* (1991), 60 Ohio St.3d 143. Furthermore, in construing a complaint, the trial court must presume the truth of all of the factual allegations in the complaint and must make all reasonable inferences in favor of the non-moving party. *Id.*

There are only two reasons for dismissing a complaint for declaratory judgment before the court addresses the merits of the case: (1) there is neither a justiciable issue nor an actual controversy between the parties requiring speedy relief to preserve rights which may otherwise be lost or impaired; or (2) in accordance with R.C. 2721.07, the declaratory judgment will not terminate the uncertainty or controversy. *Halley v. Ohio Co.* (1995), 107 Ohio App.3d 518; *Therapy Partners of Am., Inc. v. Health Providers, Inc.* (1998), 129 Ohio App.3d 572; and *Burger Brewing Co. v. Liquor Control Comm.* (1973), 34 Ohio St.2d 93. A justiciable issue requires the existence of a legal interest or a right. *In Defense of Deer v. Cleveland Metroparks* (2000), 138 Ohio App.3d 153. A "controversy" exists for purposes of a declaratory judgment action when there is a genuine dispute between the parties having adverse legal interests. *Wagner v. Cleveland* (1988), 62 Ohio App.3d 8.

Appellant's complaint sought declarations concerning the following issues: (1) the parole board's use of the new guidelines actually imposed a greater sentence on him in violation of the Ohio Constitution; (2) the parole board improperly considered statements in the pre-sentencing investigation report concerning the alleged rape of one of the kidnapping victims after being ordered by the Lawrence County Court of Common

Pleas to remove such evidence from his file; and (3) a civil rights violation under Section 1983, Title 42, U.S.Code for deliberate and intentional infliction of emotional distress.

Appellant first contends essentially that the parole board's use of the new guidelines violates the *ex post facto* clause and argues that he is being incarcerated for a longer period of time than his sentence. For the following reasons, this court disagrees.

The *ex post facto* clause, Section 10, Article I of the United States Constitution, states that an *ex post facto* law literally means "[a]fter the fact; by an act or fact occurring after some previous act or fact, and relating thereto." The purpose of the *ex post facto* law is to "ensure that legislative acts 'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.'" *Id.* However, the *ex post facto* clause only applies to criminal statutes. *California Dept. of Corr. v. Morales* (1995), 514 U.S. 499.

An *ex post facto* law is one that makes an action done before the passing of the law which was innocent when done, criminal, and punishes that action or aggravates a crime making it more severe than it was when committed. State legislators or Supreme Courts are barred by the due process clause from achieving precisely the same result by judicial construction. *Bouie v. City of Columbia* (1964), 378 U.S. 347.

At no time during appellant's imprisonment has there been an Ohio statute which requires the release of an inmate upon serving only the minimum time of an indefinite sentence. In addressing appellant's contention that the guidelines are being used to impose a greater sentence on him, it must be remembered that appellant had no constitutional right to parole. *State ex rel. Hattie v. Goldhardt* (1994), 69 Ohio St.3d 123. In addition, the Ohio Adult Parole Authority has very broad discretion in determining when to

grant or deny parole. The decision of the parole authority to change conditions of parole which are not contrary to statute lies fully within the discretion of the Ohio Adult Parole Authority. *A.R. Jago v. Van Curen* (1981), 454 U.S. 14. Consequently, an Ohio prisoner who is denied parole is not thereby deprived of "liberty" unless the state law makes the parole decision mandatory. *State ex rel. Ferguson v. Ohio Adult Parole Auth.* (1989), 45 Ohio St.3d 355. An inmate has no right to rely on the version of the Ohio Adult Parole Authority's internal guidelines that were in effect when he was originally sentenced and their use of amended guidelines is not an *ex post facto* violation and does not violate a protected due process liberty interest. *Thompson v. Ghee* (2000), 139 Ohio App.3d 195. Consequently, appellant's complaint does not present a justiciable issue as to the guidelines.

Appellant also contends that the parole board improperly considered evidence in the pre-sentence investigation report concerning the alleged rape of one of the kidnapping victims. Appellant asserts that the Lawrence County Court of Common Pleas specifically ordered respondent to remove any and all evidence from his file concerning the alleged rape. R.C. 2967.03 grants the parole board discretion in granting parole. However, in carrying out its statutory duty to determine an inmate's suitability for parole, the Ohio Adult Parole Authority may investigate and examine prisoners concerning their mental and moral qualities and characteristics and other matters affecting their fitness to be at liberty without being a threat to society. R.C. 2967.03. In determining the appropriate defense category, the parole board is authorized to consider the conduct and circumstances surrounding the offense. Part of those circumstances surrounding the offense for which appellant was found guilty involved the alleged rape of one of the kidnapping vic-

tims. Although appellant argues that the Lawrence County Court of Common Pleas ordered respondents to remove any evidence concerning the alleged rape from his records, the court found that that question should be brought by appellant in the Lawrence County Court of Common Pleas and it was not appropriate to be answered by the Franklin County Court of Common Pleas. However, even if considered, the decision of the Lawrence County Court of Common Pleas ordered respondent to remove its finding as to his sexual predator status and nothing further. As such, appellant failed to raise a justiciable issue as to this argument as well.

In reviewing his complaint, appellant asserted a violation of Section 1983, Title 42, U.S.Code, but did not assert any facts which would state a claim for such a violation. As such, appellant failed to assert a justiciable issue or demonstrate that a controversy existed in this regard.

Based on the foregoing, appellant's first and second assignments of error are overruled and the judgment of the trial court granting respondent's motion to dismiss appellant's complaint seeking declaratory judgment and injunctive relief is affirmed.

Judgment affirmed.

DESHLER and LAZARUS, JJ., concur.
