

[Cite as *Harris v. Wilkinson*, 2001-Ohio-4052.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Dwayne Harris,	:	
	:	
Plaintiff-Appellant,	:	No. 01AP-598
	:	
v.	:	(ACCELERATED CALENDAR)
	:	
Reginald Wilkinson et al.,	:	
	:	
Defendants-Appellees.	:	

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D E C I S I O N

Rendered on November 27, 2001

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*Dwayne Harris, pro se.*

*Betty D. Montgomery, Attorney General, and Charissa D. Payer, for appellees.*

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APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

Dwayne Harris, plaintiff-appellant, appeals a judgment of the Franklin County Court of Common Pleas granting a motion to dismiss in favor of Reginald Wilkinson, director of the Ohio Department of Rehabilitation and Correction ("ODRC"),

John Kinkela, chief of the Ohio Adult Parole Authority ("OAPA"), and Margarett Ghee, chairperson for the OAPA, defendants-appellees.

Appellant is confined in the Mansfield Correctional Institution. In 1989, he was incarcerated for committing offenses in three separate cases. In case No. CR-235106, appellant was indicted on and found guilty of one count of kidnapping with specifications, one count of rape with specifications, and one count of felonious assault with specifications. He was sentenced to thirteen to twenty-five years each on the kidnapping and rape counts, twelve to fifteen years on the felonious assault count, and three years on the gun specification. In case No. CR-236656, appellant was indicted on and pled guilty to one count of rape. He was sentenced to ten to twenty-five years incarceration. In case No. CR-236857, appellant was indicted on one count of felonious assault with specifications but pled guilty to aggravated assault and was sentenced to one and one-half years incarceration. All of appellant's sentences were to be served concurrently.

On December 19, 2000, appellant had a parole hearing before the OAPA. OAPA utilizes a parole guidelines manual that consists of a grid in which to place offenders in certain categories when they come up for parole. Based on parole guidelines adopted after appellant's convictions, the OAPA found appellant's convictions for two counts of rape, one count of kidnapping, and one count of felonious assault in case Nos. CR-235106 and CR-236656 constituted Category 10 offenses; and his indicted offense of felonious assault in case No. CR-236857 constituted a Category 7 offense. Based upon

these determinations, the OAPA concluded that appellant should serve two hundred sixty-three months (ten additional years) before he would be considered for parole in December 2010.

On February 21, 2001, appellant filed a complaint for declaratory judgment, claiming appellees illegally instituted the parole guidelines, the application of which violated double jeopardy, equal protection, due process, ex post facto prohibition, and improperly used these guidelines to find him ineligible for parole. Appellees filed a motion to dismiss on March 23, 2001, which the trial court granted on May 7, 2001. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

Assignment of Error No. 1

The Court of Common Pleas was legally wrong to rule that the Appellant cannot be considered for parole under parole board guidelines in use at time Appellant was committed for the first crime for which he is now imprisoned. The Appellee has created a liberty interest in parole protectable [*sic*] under the Fourteenth Amendment[']s Due Process Clause, by applying the 2000 and 1998 Guidelines to Appellant[']s case.

Assignment of Error No. 2

The Court of Common Pleas was legally wrong to conclude that the Parole Board had the Legal Authority to change Parole Eligibility which is Established by statute (R.C. 2967.03, 2967.13, and 2967.19), and as codified by pre-existing (ODRC) Administration Regulation, policies and procedures approved by the Administrative Procedures Act. O.R.C. 119 et seq.

Assignment of Error No: [3]

The Court of Common Pleas was legally wrong to rule that Parole Guidelines are not subject to the Ex Post Facto

Clause, although the Guidelines involve a procedural matter, but they still affect substantial rights attendant to parole eligibility, O.R.C. 2967.13, 2967.19.

We will address appellant's first and third assignments of error together because they are related. Appellant argues in his first assignment of error the trial court erred in granting appellees' motion to dismiss because OAPA improperly used the 1998 and 2000 parole guidelines rather than the guidelines in place at the time of his conviction in 1989. Appellant argues in his third assignment of error the application of the 1998 and 2000 parole guidelines to his parole hearing violated the ex post facto prohibition of the United States Constitution.

Appellant filed a complaint for declaratory judgment. A declaratory judgment action is a civil action and provides a remedy in addition to other legal and equitable remedies available. *Aust v. Ohio State Dental Bd.* (2000), 136 Ohio App.3d 677, 681. "The essential elements for declaratory relief are (1) a real controversy exists between the parties, (2) the controversy is justiciable in character, and (3) speedy relief is necessary to preserve the rights of the parties." *Id.* Further, appellate review of a trial court's decision to dismiss a case pursuant to Civ.R. 12(B)(6) is *de novo*. *Hunt v. Marksman Prod., Div. of S/R Industries, Inc.* (1995), 101 Ohio App.3d 760, 762. In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted pursuant to Civ.R. 12(B)(6), "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. University Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus. The court must presume that all factual

allegations in the complaint are true and construe all inferences that may be reasonably drawn therefrom in favor of the nonmoving party. *Bridges v. Natl. Engineering & Contracting Co.* (1990), 49 Ohio St.3d 108, 112.

With regard to appellant's assignments of error, it is clear that under R.C. 2967.03, a parole decision is discretionary. *State ex rel. Blake v. Shoemaker* (1983), 4 Ohio St.3d 42; *State ex rel. Ferguson v. Ohio Adult Parole Auth.* (1989), 45 Ohio St.3d 355. The OAPA's use of internal guidelines does not alter the decision's discretionary nature. *State ex rel. Hattie v. Goldhardt* (1994), 69 Ohio St.3d 123, 125. Because neither statute nor regulation created the guidelines, and the board need not follow them, they place no "substantive limits on official discretion," and appellant cannot claim any right to have any particular set of guidelines apply. *Olim v. Wakinekona* (1983), 461 U.S. 238, 249, 103 S.Ct. 1741, 1747; see, also, *State ex rel. Cannon v. Ohio Dept. of Rehab. & Corr.* (Oct. 31, 2000), Franklin App. No. 00AP-327, unreported. The Ohio Supreme Court has specifically held that a prisoner has no right to rely on the parole guidelines in effect prior to his parole hearing date, and, thus, any application of amended parole guidelines are not retroactively applied ex post facto. *State ex rel. Bealler v. Ohio Adult Parole Auth.* (2001), 91 Ohio St.3d 36; *Cannon, supra*, citing *State v. Caslin* (Sept. 29, 1998), Franklin App. No. 98AP-463, unreported. Therefore, appellant was deprived of no protected liberty interest when the OAPA used different guidelines than were effective at the time of his conviction, and he can claim no due process rights with respect to the parole determination. See *Jago v. Van Curen* (1981), 454 U.S. 14, 20-21, 102 S.Ct. 31, 35.

Further, the United States District Court for the Southern District of Ohio has held the parole guidelines are not violative of ex post facto prohibition, stating:

[C]hanges in the parole matrix or parole guidelines may constitutionally be applied to inmates even though the changes occur after the inmates entered the state prison system. As the Court noted in its previous opinion and order, parole is a discretionary decision, and a state may constitutionally add or delete factors which guide the Parole Board's exercise of its discretion without running afoul of the Constitution. Simply put, an inmate has no vested interest in any particular set of parole guidelines, regulations, or matrices which assist the Parole Board in exercising its discretion, and changes in those matters do not impair any rights enjoyed by state prisoners pursuant to the United States Constitution. *Akbar-El v. Wilkinson* (Apr. 28, 1998), S.D. Ohio No. C2-95-472, unreported.

The Sixth Circuit Court of Appeals affirmed this finding in *Akbar-El v. Wilkinson* (6<sup>th</sup> Cir. Apr. 28, 1999) 181 F.3d 99. Thus, appellant's first and third assignments of error are overruled.

Appellant first argues in his second assignment of error that the OAPA improperly considered his indicted offense of felonious assault in case No. CR-236857 instead of the lesser offense he pled guilty to, aggravated assault, in determining the appropriate guideline category, which determines the range of months he would have to serve before being considered for release. Appellant asserts felonious assault is a Category 7 offense, while aggravated assault is only a Category 5 offense. Appellant argues that placing him in Category 7, using his indicted offense, breached his plea agreement with the state and violated his Constitutional rights.

This court has very recently addressed this argument in *Oswalt v. Ohio Adult Parole Auth* (Oct. 4, 2001), Franklin No. 01AP-363, unreported, and *Davis v. Ghee* (Sept. 18, 2001), Franklin App. No. 01AP-280, unreported. In *Oswalt* and *Davis*, we relied upon *Randolph v. Ohio Adult Parole Auth.* (Jan. 21, 2000), Miami App. No. 99 CA 17, unreported, in finding that due process demands the OAPA place inmates in the appropriate offense seriousness category and guideline range, based on the crime of conviction, not the crime for which the inmate may have been indicted. Although other courts have disagreed with the holding in *Randolph*, we continue to believe *Randolph* is the better-reasoned line of cases. See, e.g., *Llewellyn v. Ohio Adult Parole Auth.* (Oct. 15, 2001), Warren App. No. CA2000-11-101, unreported; *Houston v. Wilkinson* (June 29, 2001), Allen App. No. 1-01-52, unreported; and *Layne v. Ohio Adult Parole Auth.* (May 29, 2001), Marion App. No. 9-2001-06, unreported. We note the Third Appellate District has certified the *Layne* decision to the Supreme Court of Ohio as being in conflict with *Randolph*.

In the present case, appellant alleged in his complaint that "Defendants [sic] new guidelines manual serves to unconstitutionally breach certain Plaintiff [sic] original plea agreements that were entered into in conjunction with the judicial branch of the government to continue the length of incarceration." Although the precise nature of this claim in his complaint is not clear, presuming all factual allegations contained in the complaint are true, and making all reasonable inferences in favor of appellant, we construe the above cited cause of action to allege a claim to which the holding in

*Randolph* applies. See *Talbert v. Ohio Adult Parole Auth.* (June 12, 2001), Franklin App. No. 00AP-1461, unreported (the application of *Randolph* is limited to those who allege that they were considered *ineligible* for parole based on the charges for which they were not convicted, and does not apply to those who allege they were *considered and rejected* for parole based on the indicted charges that were dismissed as part of a plea agreement). Thus, pursuant to our recent decisions in *Oswalt* and *Davis*, we find appellant's complaint presented facts showing a real controversy exists between the parties with regard to this issue that is justiciable in character, and speedy relief may be necessary to preserve his rights under the plea agreement. Appellant's argument in this regard is well-taken.

Insofar as appellant's other claims in his complaint assert the OAPA breached their plea agreement by using his charged offense of felonious assault rather than the lesser-included offense of aggravated assault he pled guilty to in considering whether he was suitable for parole, we disagree. As readily noted by the court in *Randolph* and this court in *Talbert*, it is well-established that the OAPA has the discretion to consider crimes for which an appellant is indicted but not convicted when assessing whether to grant parole. See *State ex rel. Askew v. Goldhart* (1996), 75 Ohio St.3d 608, 609; Ohio Admin. Code 5120:1-1-07(C)(12) and (16). Although an indictment is a mere accusation, here it indicates the grand jury found probable cause to believe appellant committed the offense of felonious assault. See *Askew, supra*, at 609-610. Appellant did not allege in his complaint, and does not argue here, that the prosecutor had promised

him the offense that was dismissed could not or would not be considered by the OAPA when it determined parole. Appellant's unilateral expectations are insufficient. See *State v. Callahan* (Oct. 6, 2000), Montgomery App. No. 18237, unreported. Thus, the OAPA could have used the charged offense of felonious assault in determining whether to grant or deny parole, and appellant's complaint failed to allege any facts for which he could be entitled to relief in this regard. For the foregoing reasons, appellant's second assignment of error is overruled in part and sustained in part.

Accordingly, we find the trial court erred in part in granting appellees' motion to dismiss. Appellant's first and third assignments of error are overruled, his second assignment of error is sustained in part and overruled in part, and the judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part and this case is remanded to that court for further proceedings consistent with this decision.

*Judgment affirmed in part and reversed in part;  
case remanded.*

BOWMAN and PETREE, JJ., concur.

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