

[Cite as *Fuller v. Collins*, 2010-Ohio-5444.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Michael Fuller,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 10AP-297
v.	:	(C.P.C. No. 09CVH03-3395)
	:	
Ernie Moore, Director, Ohio Department	:	(ACCELERATED CALENDAR)
of Rehabilitation and Correction,	:	
	:	
Defendant-Appellee.	:	
	:	

D E C I S I O N

Rendered on November 9, 2010

Michael Fuller, pro se.

Richard Cordray, Attorney General, and Ashley Rutherford,
for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiff-appellant, Michael Fuller, pro se, appeals from a judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Ernie Moore, Director of the Ohio Department of Rehabilitation and Correction, and overruling appellant's motion for summary judgment.¹

¹ While this litigation was pending, Ernie Moore replaced Terry Collins as the Director of the Ohio Department of Rehabilitation and Correction. Since the position of director is a public office, Moore's substitution as the proper party to the action is automatic under Civ.R. 25(D)(1).

{¶2} Appellant is currently incarcerated in the Grafton Correctional Institution serving numerous indefinite sentences resulting from numerous convictions in the early 1990s. More specifically, in 1990, appellant was sentenced on two counts of aggravated robbery and one count of robbery. The aggregate sentence for these felonies is five to 15 years. In 1992, appellant was sentenced on two counts of rape, two counts of aggravated burglary, one count of attempted felonious assault, one count of felonious assault, and one count of kidnapping. The aggregate sentence for these felonies is 25 to 75 years. Appellant's aggregate minimum sentence for all these felonies was capped at 15 years in compliance with Ohio Adm.Code 5120-2-03(F)(1). Appellant received a parole hearing after serving his aggregate minimum sentence of 15 years. Appellant was denied parole.

{¶3} On March 6, 2009, appellant filed a complaint in declaratory judgment requesting that the trial court declare that, pursuant to former R.C. 2929.41(E)(2), he is entitled to be released from confinement because he has served his total aggregate minimum sentence of 15 years. Both parties filed motions for summary judgment. The court found that an inmate who has committed multiple felonies and has served his aggregate minimum sentence is only entitled to a parole hearing, not release from prison. The court granted summary judgment in favor of appellee and overruled appellant's motion for summary judgment.

{¶4} Appellant sets forth the following two assignments of error:

[1]. The trial court erred in interpreting R.C. 2929.41(E)(2) as not applying to indefinite sentences.

[2]. The trial court erred when it granted appellee's cross-motion for summary judgment since he clearly failed to meet the standard set forth by that court.

{¶5} Appellant's assignments of error are related and will be addressed together.

Appellant argues that the trial court improperly granted summary judgment in favor of appellee.

{¶6} Summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶7} "[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Once the moving party meets its initial burden, the nonmovant bears a reciprocal burden to produce competent evidence of the types listed in Civ.R. 56(C) showing that there is a genuine issue for trial. *Id.*; Civ.R. 56(E). Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95.

{¶8} Appellate review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of*

Comms. (1993), 87 Ohio App.3d 704, 711. Thus, we apply the same standard as the trial court and conduct an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107.

{¶9} Appellant argues that the trial court erred in failing to declare that, pursuant to former R.C. 2929.41(E)(2) and the holding of the Supreme Court of Ohio in *Yonkings v. Wilkinson*, 86 Ohio St.3d 225, 1999-Ohio-98, he is required to be released from confinement after serving his aggregate minimum sentence of 15 years. We disagree.

{¶10} Former R.C. 2929.41(E)(2) provides, in relevant part:

(E) Consecutive terms of imprisonment imposed shall not exceed:

* * *

(2) An aggregate minimum term of fifteen years, plus the sum of all three-year terms of actual incarceration imposed pursuant to section 2929.71 of the Revised Code and the sum of all six-year terms of actual incarceration imposed pursuant to section 2929.72 of the Revised Code, when the consecutive terms imposed are for felonies other than aggravated murder or murder.

{¶11} In *Yonkings*, the Supreme Court of Ohio held that former R.C. 2929.41(E)(2) only applied to indefinite sentences and that the 15-year cap had no application to a definite sentence. Appellant misconstrues the *Yonkings* holding to mean that an inmate serving consecutive indefinite sentences must be released after serving the 15-year aggregate minimum term. Appellant's interpretation is unreasonable and absurd, as it would result in the automatic release of all defendants at 15 years regardless of the number or severity of their crimes.

{¶12} As noted above, the aggregate minimum sentence for appellant's felonies was capped at 15 years. At that point, appellant became eligible for parole. However, he was denied parole. As noted by the trial court, the decision to grant or deny parole is within the exclusive discretion of the Ohio Parole Board, and an inmate who is denied parole is not deprived of liberty unless state law mandates parole. *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 1994-Ohio-39.

{¶13} For the foregoing reasons, we conclude that the trial court properly granted summary judgment in favor of appellee and overruled appellant's motion for summary judgment. Accordingly, we overrule appellant's first and second assignments of error.

{¶14} Appellant has also filed in this court a "Complaint for Declaratory Judgment," requesting that this court declare that, pursuant to former R.C. 2929.41(E)(2), he is entitled to be released from confinement because he has served his total aggregate minimum sentence of 15 years. Initially, we note that Ohio appellate courts lack original jurisdiction over claims for declaratory judgment. *State ex rel. Ministerial Day Care Assn. v. Zelman*, 100 Ohio St.3d 347, 2003-Ohio-6447, ¶22. Moreover, as stated above, appellant is not entitled to release from confinement.

{¶15} Having overruled appellant's assignments of error, we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK, P.J., and BROWN, J., concur.
