

[Cite as *Semenchuk v. Ohio Dept. of Rehab. & Corr.*, 2010-Ohio-6394.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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|---------------------------------------|---|----------------------------|
| Allen J. Semenchuk, | : | |
| Plaintiff-Appellant, | : | |
| v. | : | No. 10AP-19 |
| Ohio Department of Rehabilitation and | : | (C.P.C. No. 08CVH12-18073) |
| Correction, | : | (REGULAR CALENDAR) |
| Defendant-Appellee. | : | |
| | : | |

D E C I S I O N

Rendered on December 28, 2010

Allen J. Semenchuk, pro se.

Richard Cordray, Attorney General, and Mary Anne Reese,
for appellee.

ON MOTION TO CERTIFY CONFLICT

CONNOR, J.

{¶1} Pursuant to App.R. 25, plaintiff-appellant, Allen J. Semenchuk ("appellant"), moves this court for an order certifying a conflict between our decision in *Semenchuk v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-19, 2010-Ohio-5551, and the decision rendered by the Fifth District in *Boylen v. Ohio Dept. of Rehab. & Corr.*, 182 Ohio App.3d 265, 2009-Ohio-1953. Defendant-appellee, Ohio Department of Rehabilitation and

Correction ("appellee"), has opposed this motion. For the reasons that follow, we deny appellant's motion to certify a conflict.

{¶2} Section 3(B)(4), Article IV, of the Ohio Constitution governs motions seeking an order to certify a conflict. It provides:

Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

See also *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 1993-Ohio-223, syllabus, rehearing denied by *Whitelock v. Cleveland Clinic Found.* (1993), 67 Ohio St.3d 1420.

{¶3} In *Whitelock*, the Supreme Court of Ohio held, pursuant to Section 3(B)(4), Article IV, Ohio Constitution and S.Ct.Prac.R. III, "there must be an actual conflict between appellate judicial districts on a rule of law before certification of a case to the Supreme Court for review and final determination is proper." *Id.* at paragraph one of the syllabus. The court further stated:

[A]t least three conditions must be met before and during the certification of a case to this court pursuant to Section 3(B)(4), Article IV of the Ohio Constitution. First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be "upon the same question." Second, the alleged conflict must be on a rule of law - - not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

(Emphasis sic.) *Id.* at 596

{¶4} Additionally, factual distinctions between cases are not a basis upon which to certify a conflict. *Id.* at 599. "For a court of appeals to certify a case as being in conflict

with another case, it is not enough that the reasoning expressed in the opinions of the two courts of appeals be inconsistent; the judgments of the two courts must be in conflict."

State v. Hankerson (1989), 52 Ohio App.3d 73, paragraph two of the syllabus.

{¶5} Appellant proposes the following question to be certified:

[Whether] the language of O.R.C. 2969.26(B) i[s] mandatory as is section A of the same code and [whether] a court must stay a proceeding to allow administrative exhaustion rather than dismissal.

(Motion to Certify Conflict.)

{¶6} Appellant's motion seems to assert that our decision in this case is in conflict with *Boylen*. In *Boylen*, the Fifth District reversed the trial court's ruling dismissing an inmate's complaint for failing to comply with R.C. 2969.26(A), finding the trial court should have stayed the action. Appellant argues the trial court made the same error in his case and argues our decision to affirm the dismissal of his complaint, rather than ordering the trial court to stay the case, goes against *Boylen*. However, we find the two cases are factually distinguishable.

{¶7} In *Boylen*, an inmate appealed from a trial court's judgment dismissing his complaint requesting declaratory judgment, injunctive relief, and monetary damages against the department of correction, the individual institution, and various employees of the county clerk's office. The complaint alleged funds had been improperly removed from his inmate account for the collection of court costs.

{¶8} The inmate attempted to comply with R.C. 2969.26(A) by attaching an affidavit to the complaint stating he had filed an appeal with the institution regarding the removal of court costs from his account. The inmate admitted in his affidavit that the grievance procedure was still ongoing and that a final decision had not yet been made.

Several employees of the county clerk's office filed a motion to dismiss for lack of subject-matter jurisdiction because the inmate had failed to establish he had exhausted his administrative remedies pursuant to R.C. 2969.26(A) prior to filing his complaint. The trial court eventually dismissed the complaint for failure to exhaust administrative remedies pursuant to R.C. 2969.26(A).

{¶9} The Fifth District Court of Appeals reversed, finding that, although the inmate failed to comply with the mandatory provisions of R.C. 2969.26(A), which require the filing of an affidavit stating that the grievance was filed, the date on which a decision on the grievance was received, and a copy of the written decision, the complaint was not subject to dismissal at that time, due to the procedure set forth in R.C. 2969.26(B), since the inmate had admitted the grievance procedure was still ongoing. R.C. 2969.26(B) states, "[i]f the civil action or appeal is commenced before the grievance system process is complete, the court shall stay the civil action or appeal for a period not to exceed one hundred eighty days to permit the completion of the grievance system process."

{¶10} As a result, the Fifth District determined that because the grievance process had not yet been completed at the time the inmate filed his civil action, the trial court was required to stay the civil action for 180 days to allow the inmate to complete the grievance process, rather than dismiss the complaint.

{¶11} The facts and circumstances in the instant case are different from those found in *Boylen*. Here, like the inmate in *Boylen*, appellant failed to meet the mandatory requirements of R.C. 2969.26(A). However, unlike the inmate in *Boylen*, appellant's affidavit does not indicate that the grievance procedure was still ongoing. In fact,

appellant's affidavit states: "I have filed numerous grievance and other paperwork with the ODRC inn [sic] this matter[.] [A] few final decisions are attached."

{¶12} Appellant does not aver that he is still participating in the grievance process or that the matter is yet to be resolved at that level. Instead, appellant asserts he did in fact exhaust his administrative remedies, although he failed to attach proper proof. In addition, we are unaware of anything within the record which indicates that the grievance procedure was still ongoing at the time appellant filed his civil action in the court of common pleas. As a result, the provision requiring a stay as set forth in R.C. 2969.26(B) is not applicable here, and the trial court was not required to stay the proceeding, rather than dismiss the complaint.

{¶13} Therefore, we conclude our decision is not in conflict with *Boyen*. We find the two cases are factually different, and as a result, a stay is not required here pursuant to R.C. 2969.26(B). Because our determination is based upon factual distinctions, and because factual distinctions are not a basis for certification of a conflict (see *Whitelock*), there is no basis here for certifying a conflict.

{¶14} Accordingly, we deny appellant's motion to certify conflict.

Motion to certify conflict denied.

TYACK, P.J., and McGRATH, J., concur.
