

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Billie Davis,	:	
	:	
Plaintiff-Appellant,	:	No. 12AP-669
	:	(Ct. of Cl. No. 2010-10475)
v.	:	
	:	
Ohio Department of Rehabilitation	:	(REGULAR CALENDAR)
and Correction,	:	
	:	
Defendant-Appellee.	:	
	:	

D E C I S I O N

Rendered on September 17, 2013

Alan I. Goodman, for appellant.

Michael DeWine, Attorney General, *Stephanie Pestello-Sharf*
and *Amy Brown*, for appellee.

APPEAL from the Court of Claims of Ohio

CONNOR, J.

{¶ 1} Plaintiff-appellant, Billie Davis ("Davis"), appeals from a judgment of the Court of Claims of Ohio granting the motion for summary judgment filed by defendant-appellee, Ohio Department of Rehabilitation and Correction ("ODRC"), and denying Davis' cross-motion for summary judgment on the issue of liability only. For the following reasons, we affirm the judgment of the Court of Claims of Ohio.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On September 13, 2010, in the Court of Claims of Ohio, Davis filed a complaint against ODRC for false imprisonment. ODRC answered the complaint and denied liability. Thereafter, Davis and ODRC each moved for summary judgment.

{¶ 3} Earlier, on October 16, 2008, Davis pled guilty to four counts of theft, twelve counts of forgery, and one count of misuse of credit cards in the Cuyahoga County Court of Common Pleas. Davis admitted that she forged and cashed checks belonging to the elderly couple in her care, and that she used their credit card to make purchases without their consent. Davis took approximately \$11,000 from the elderly couple.

{¶ 4} On April 14, 2009, the Honorable Bridget M. McCafferty, a judge of the Cuyahoga County Court of Common Pleas sentenced Davis to 17 one-year terms of imprisonment to be served concurrently. As a result, Davis entered ODRC's custody on April 24, 2009.

{¶ 5} As set forth in R.C. 5120.032, ODRC operates an intensive program prison ("IPP") in which eligible offenders in its custody may participate in a 90-day period of intense educational and rehabilitative programming, after which time ODRC may reduce the stated prison term and release the offender to post-release control. *See* Ohio Adm.Code 5120-11-01 et seq.

{¶ 6} At the time of sentencing, a trial court may recommend that an eligible offender be placed in an IPP. Also at sentencing, the trial court is authorized to disapprove IPP placement. If the sentencing court "disapproves" placement, the statute commands that ODRC "shall not place the prisoner" in an IPP. R.C. 5120.032(B)(1)(a).

{¶ 7} If the sentencing court makes no recommendation regarding IPP placement, ODRC is authorized to place an eligible offender in an IPP, provided that ODRC first:

[S]hall notify the sentencing court of the proposed placement of the prisoner in the intensive program prison and shall include with the notice a brief description of the placement. The court shall have ten days from receipt of the notice to disapprove the placement. If the sentencing court disapproves the placement, the department shall not proceed with it. If the sentencing court does not timely disapprove of the placement, the department may proceed with plans for it.

R.C. 5120.032(B)(1)(a).

{¶ 8} At the time of Davis' sentencing, Judge McCafferty neither recommended nor disapproved Davis for IPP placement.

{¶ 9} On May 22, 2009, by certified mail return receipt requested, ODRC mailed form 2502 to Judge McCafferty at her courthouse address. The form is captioned "Notice to Sentencing Court of Offender's Recommended Placement Into the Intensive Program Prison." The notice indicated that Davis was imprisoned at the Ohio Reformatory for Women ("ORW"), located in Marysville, Ohio, and explained the proposed placement of Davis into the IPP. The form instructed that the sentencing judge "may approve or disapprove the placement, or you may express no opinion." It further instructed that, if the sentencing judge wishes to disapprove, "your decision must be received by [the ORW warden's] office * * * within 30 days of the signature date of the certified-mail receipt."

{¶ 10} On June 3, 2009, ORW received the certified mail return, which was stamped as having been received by the Cuyahoga County "Mail Services Manager" on June 1, 2009.

{¶ 11} Having received no response to the May 22, 2009 notice, ODRC placed Davis into the IPP beginning July 9, 2009, with an anticipated completion date of October 6, 2009.

{¶ 12} On September 21, 2009, by regular U.S. mail, ODRC mailed form 2390 to Judge McCafferty at her courthouse address. The form is captioned "Notice to Sentencing Court." Indicating Davis as the offender, the pre-printed form explained:

The offender will soon successfully complete the ninety-day incarceration phase of the IPP and will be released from prison to post-release control.

In the event that previous attempts to notify the Court of Intensive Program Prison placement have failed, and the Court is receiving its first notice in this instance, the Department will act upon the Court's decision to disapprove the placement, if received prior to release.

{¶ 13} On September 24, 2009, by facsimile, Judge McCafferty returned to ODRC a copy of the September 21, 2009 notice. On the notice, above her signature, Judge McCafferty wrote: "Be advised this court did not directly receive notification on 5-27-09, sent by you to our county. Under no circumstances should Ms. Davis not serve her full prison sentence." (Emphasis sic.)

{¶ 14} The record contains the affidavit of Trevor Clark executed May 16, 2012. Clark is employed by ODRC as staff counsel, a position he has held since August 2007.

{¶ 15} According to Clark, in light of Judge McCafferty's disapproval of Davis' placement in the IPP, the ODRC director reviewed the matter and determined that Davis should be removed from the IPP. Clark avers that, on October 6, 2009, he personally informed the IPP coordinator of the director's decision and instructed that Davis was to be removed from the IPP. According to Clark, in spite of this directive, ORW staff awarded Davis a certificate of program completion. ORW did not conduct a removal hearing to remove Davis from the IPP as directed by Ohio Adm.Code 5120-11-08. Davis was released from ODRC custody on December 23, 2009, approximately four months prior to her original release date.

{¶ 16} Davis submitted her own affidavit in support of her motion for summary judgment. In the affidavit, Davis avers that "[o]n the morning of October 7, 2009, the day [she] was supposed to be released, [she] was asked to report to the records department where [she] was told by a clerk * * * that [she] was not going to be released because the 'judge would not allow it.' "

{¶ 17} ODRC answered interrogatories submitted by Davis in this action. One of the interrogatories asks: "Why was [Davis] released from incarceration in December 2009." In response, ODRC states: "[Davis] was released because the due process removal hearing required by the O.A.C. 5120-11-05 was not done."

{¶ 18} On May 17, 2012, ODRC moved for summary judgment. In support of its motion, ODRC submitted the affidavit of Trevor Clark referenced above. On May 29, 2012, Davis moved for summary judgment on the issue of liability only. In support, Davis submitted her own affidavit referenced above. On July 31, 2012, the trial court entered judgment granting ODRC's motion for summary judgment and denying Davis' motion for summary judgment.

{¶ 19} In its July 31, 2012 entry, the trial court relies on *Kempf v. State*, 181 Ohio App.3d 623, 2009-Ohio-1877 (8th Dist.). In *Kempf*, the court held that R.C. 5120.032 "requires actual receipt and knowing approval by the trial court." *Id.* at ¶ 17. Paraphrasing *Kempf*, the trial court's entry states that "without actual receipt of the notice, the statutory prerequisite for IPP placement is not fulfilled and the offender's participation in an IPP is void ab initio." Apparently, the trial court concluded that Judge McCafferty did not actually receive ODRC's May 22, 2009 notice that was stamped by the

"Mail Services Manager" on June 1, 2009. Thus, the court held that, the May 22, 2009 notice did not meet the statutory requirement for Davis' participation in the IPP and her participation was void ab initio.

II. ASSIGNMENT OF ERROR

{¶ 20} Davis appeals, assigning the following error for our review:

The Court of Claims erred in granting Defendant's Motion for Summary Judgment and denying Plaintiff's motion for partial summary judgment on liability only as to Plaintiff's claim she was falsely imprisoned.

III. STANDARD OF REVIEW

{¶ 21} Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. of Commrs.*, 123 Ohio App.3d 158, 162 (4th Dist.1997). "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Bank Corp.*, 122 Ohio App.3d 100, 103 (12th Dist.1997). We must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 22} Summary judgment is proper only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183 (1997).

IV. REVIEW OF ASSIGNMENT OF ERROR

{¶ 23} Because we disagree with Davis' sole assignment of error, we affirm the judgment of the Court of Claims.

{¶ 24} As earlier noted, the trial court relied upon *Kempf*. We find *Kempf* persuasive, as did the trial court.

{¶ 25} In *Kempf*, the petitioner, Colleen Kempf, commenced a habeas corpus action against ODRC to compel her release from prison. Kempf stole approximately

\$444,000 from St. Joseph Academy, an all girls high school in Cleveland, Ohio. In October 2007, Judge Joseph D. Russo sentenced Kempf to four years in prison and ordered restitution.

{¶ 26} Shortly after her arrival at the ORW, Kempf was informed by ORW officials that she might be eligible for the IPP. Judge Joseph D. Russo made no recommendation as to Kempf's placement in an IPP at the time of sentencing.

{¶ 27} Following Kempf's October 4, 2007 application for an IPP, ODRC sent the required "veto letter" by regular U.S. mail on November 8, 2007. The letter was addressed to "Honorable Judge Russo" at the address of the Cuyahoga County Court of Common Pleas. It did not specify which Judge Russo. The *Kempf* court noted that there are several Judge Russos on the Cuyahoga County Court of Common Pleas. The veto letter included Kempf's name and the correct criminal case number. The parties stipulated that the letter was sent by regular mail, instead of by certified mail, as required by the Ohio Administrative Code.

{¶ 28} The veto letter was not returned to ODRC as "undeliverable" or for any other reason, and the sentencing court did not send a response. Accordingly, Kempf was accepted into the IPP, and successfully completed it.

{¶ 29} On February 7, 2008, ODRC sent another notice by regular U.S. mail to the "Honorable Judge Russo" at the common pleas court address to inform him of Kempf's successful completion of the IPP. The letter was not returned to ODRC. In an affidavit attached to ODRC's motion for summary judgment, Judge Joseph D. Russo swears that he personally opens and reviews all mail addressed to him or his courtroom, and that he never received either letter. Kempf did not dispute this. Judge Joseph D. Russo stated that he would not have approved of Kempf's participation in the IPP.

{¶ 30} On February 9, 2008, ODRC released Kempf from custody under one year of post-release control. Upon return to her home in Cuyahoga County, Kempf was assigned to a parole officer.

{¶ 31} By the afternoon of February 20, 2008, ODRC had learned that Judge Joseph D. Russo and the Cuyahoga County prosecutor were questioning how Kempf was placed in the program. Specifically, ODRC learned that Judge Joseph D. Russo was stating that he never approved of Kempf's placement in the program. ODRC concluded

that it had erroneously released Kempf. ODRC reasoned that it had no authority to place Kempf in the IPP because it had failed to mail the veto letter according to statute and rule. Consequently, ODRC arranged for Kempf to be reincarcerated by having her meet with her parole officer on February 21, 2008, on the pretext of showing her documents regarding restitution to St. Joseph Academy. When she arrived, Kempf was immediately arrested and reincarcerated.

{¶ 32} In granting ODRC's motion for summary judgment, and denying Kempf's motion for summary judgment, and denying the writ of habeas corpus, the *Kempf* court explained:

Kempf argues that when a prisoner is released through no fault of his own, as a result of state actions that transcend simple neglect and when reincarceration is unequivocally inconsistent with fundamental principles of justice, then the state should not reincarcerate. Kempf expounds that her successful completion of the IPP, her release upon everyone's good-faith belief that she was entitled to be released on February 19, 2008, and the department's summary revocation of her release upon learning that the judge might not have actually received the required notification transcends simple neglect and shocks the modern conscience.

Indeed, the court considers that the department's knowing abandonment of the certified-mail requirement in the Ohio Administrative Code may be problematic. In an unfavorable light to the department, the knowing disregard of the Administrative Code "short circuits" the process and permits arbitrary enforcement. The department justified reincarcerating Kempf because it could not document that the veto letter was sent according to statute and rule. However, by disregarding the certified-mail requirement, it prevented itself from being able to document receipt. Thus, when a trial judge says, "I didn't get the notice," "I don't know if I got the notice," or "I don't remember getting the notice," the department could declare the prisoner ineligible and reincarcerate because it cannot document what happened.

In response, the department argues that Kempf wrongly conceptualizes her situation. The critical statutory language is in R.C. 5120.032(B)(1)(a): "The court shall have ten days from receipt of the notice * * *." Similarly, Ohio Adm.Code 5120-11-03(D) provides "within ten days of mail receipt * * *." The prerequisite of successful completion of the IPP is actual

receipt by the trial judge of the veto letter. The statutory scheme requires the sentencing judge's knowing approval. Without such a receipt and knowing approval, Kempf's participation in the IPP was void ab initio, and she was always under the four-year prison sentence. Thus, her release on February 19, 2008, was erroneous, and the department could have her summarily arrested and reincarcerated pursuant to R.C. 5120.48. The department counters Kempf's "shocks the conscience" argument by arguing that neither this court nor the department can or should abrogate a judicially imposed sentence unless it is certain that all the prerequisites have been fulfilled.

In analyzing and weighing these arguments, the court concludes that the statutory language "receipt of the notice" is the critical and controlling language. The use of this language shows that the statutory scheme requires actual receipt and knowing approval by the trial court. Without that actual receipt, the statutory prerequisite is not fulfilled, and Kempf's participation in the IPP was void ab initio. Accordingly, the department did not terminate her sentence upon release and had the authority to reincarcerate her.

(Footnote omitted.) *Id.* at ¶ 14-17.

{¶ 33} Here, as in *Kempf*, Davis' participation in the IPP was void ab initio because Judge McCafferty did not actually receive the veto letter sent by certified mail on May 22, 2009, and because she expressed her disapproval of any reduction in Davis' prison sentence on the notice mailed to her on September 21, 2009, which she returned to ODRC on September 24, 2009. Accordingly, *Kempf* supports our affirmance of the judgement of the Court of Claims at issue here.

{¶ 34} Davis suggests here that the *Kempf* decision has been eroded by the decision of the Supreme Court of Ohio in *State v. Roberts*, 123 Ohio St.3d 465, 2009-Ohio-5800 ("*Roberts II*"), wherein the court reversed the decision of the First District Court of Appeals in *State v. Roberts*, 180 Ohio App.3d 216, 2008-Ohio-6827 ("*Roberts I*"). It can be noted that *Roberts II* was decided after the *Kempf* case was decided.

{¶ 35} In *Roberts II*, the court states "we conclude that the state has failed to prove that the sentencing court never received notice of the intended placement of appellant in an intensive program prison. Having received no objection from the sentencing court, the

department was authorized to place appellant in an intensive program prison and thereafter to release him." *Id.* at ¶ 17.

{¶ 36} Even if here we place the burden of proof on ODRC to show that the sentencing court never received notice of ODRC's intended placement of Davis in the IPP, we must find that ODRC met its burden, as indicated by the undisputed facts of this case. That is, on the September 21, 2009 notice that Judge McCafferty returned to ODRC, she unequivocally states that she "did not directly receive notification" of the previous notice. Thus, ODRC has shown that the statutory prerequisite for participation in the IPP was never met, and that Davis' participation was void ab initio. Therefore, we overrule appellant's assignment of error.

V. DISPOSITION

{¶ 37} Having overruled appellant's sole assignment of error, we affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

KLATT, P.J., and DORRIAN, J., concur.
