

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

TERRY SWALLEY,	:	OPINION
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2012-A-0026
THE STATE OF OHIO,	:	
Defendant-Appellee.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2012 CV 20.

Judgment: Reversed and remanded.

Ariana E. Tarighati, Law Offices of Ariana E. Tarighati, L.P.A., 34 South Chestnut Street, #100, Jefferson, OH 44047 (For Plaintiff-Appellant).

Thomas L. Sartini, Ashtabula County Prosecutor, and *Rebecca K. Divoky*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, Terry Swalley, appeals the Judgment Entry of the Ashtabula County Court of Common Pleas, granting summary judgment in favor of defendant-appellee, State of Ohio, on his claim for wrongful imprisonment. The issue before this court is whether an affidavit, asserting the claimant’s innocence, is sufficient to defeat an unsupported motion for summary judgment, in the context of a wrongful imprisonment claim. For the following reasons, we reverse the decision of the court below and remand this matter for further proceedings consistent with this opinion.

{¶2} On January 9, 2012, Swalley filed a Complaint for Wrongful Imprisonment R.C. § 2305.02 against the State of Ohio, arising out of his conviction for Illegal Assembly or Possession of Chemicals for the Manufacture of Drugs, in Ashtabula County Court of Common Pleas Case No. 2009 CR 92. Swalley was sentenced to a prison term of two years at the Lorain Correctional Institute. On April 29, 2011, Swalley's conviction was reversed by this court, in *State v. Swalley*, 11th Dist. No. 2010-A-0008, 2011-Ohio-2092. In *Swalley*, this court held: "the state failed to present sufficient evidence to allow the jury to decide whether the defendant knowingly possessed the items associated with the manufacturing of methamphetamine found in premises of an apartment to which he did not have exclusive access." *Id.* at ¶ 74.

{¶3} Swalley filed the Complaint seeking declaratory relief pursuant to R.C. 2305.02 and R.C. 2743.48. "One who claims to be a 'wrongfully imprisoned individual' under R.C. 2743.48 must prove all of the factors in R.C. 2743.48(A) by a preponderance of the evidence before seeking compensation from the state for wrongful imprisonment. *Doss v. State*, ___ Ohio St.3d ___, 2012-Ohio-5678, ___ N.E.2d ___, paragraph one of the syllabus. Specifically, the plaintiff must demonstrate: "(1) the petitioner was convicted of a felony; (2) the petitioner was sentenced for that conviction; (3) the conviction was vacated, dismissed, or reversed; [and] (4) no further prosecution was attempted or allowed for that conviction or any act associated with that conviction." *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 72, 701 N.E.2d 1002 (1998), citing R.C. 2743.48(A). Finally, the court of common pleas must determine "that the charged offense, including all lesser-included offenses, either was not committed by the individual or was not committed by any person." R.C. 2743.48(A)(5).

{¶4} On March 22, 2012, Swalley filed a Motion for Summary Judgment. Attached to the Motion were a couple pages from the transcript of Swalley's criminal trial and an affidavit. In the affidavit, Swalley stated that he was sentenced and imprisoned for the Illegal Possession of Chemicals for the Manufacture of Drugs on January 29, 2010. He remained incarcerated until his release on May 9, 2011, following this court's reversal of his conviction. Swalley further deposed as follows:

{¶5} I did not commit the crime [for] which I was convicted. I never engaged in any criminal conduct arising out of the incident that led to my conviction. I never had possession or ownership of: the items that were located in the laundry basket that was placed behind the couch in Donald Terry Matthews' living room, where I sometimes slept; the incriminating materials that were found in the common garbage can outside of Mr. Matthews' residence; or the incriminating materials in the garage.

{¶6} I did use iodine and muriatic acid to clean my MRSA infection, but I never used any of these items for purposes other than that and never used them for any criminal purpose. I am absolutely innocent of the offense for which I was found guilty. I did not commit that crime and have consistently and without reservation maintained my innocence.

{¶7} On April 23, 2012, the State of Ohio filed its Response to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment. The State attached no evidentiary materials to its Motion. The State conceded that Swalley satisfied the first four elements of R.C. 2743.48(A). The State contended that it was entitled to summary judgment, however, "because Plaintiff has brought forth no evidence to prove that he was innocent of the crime for which he was convicted and therefore wrongfully

imprisoned.” The State argued that the court of appeals decision in Swalley’s criminal case “is not evidence and even if it were, it is insufficient to prove that Plaintiff is innocent of the crimes for which he was convicted.” Moreover, Swalley’s affidavit was “not sufficient to fulfill Plaintiff’s burden of affirmatively proving his innocence of the crime for which he was convicted,” inasmuch as it consisted of “various unfounded statements that he did not commit the offense for which he was found guilty or it was not committed by any person.”

{¶8} On June 7, 2012, the trial court entered a Judgment Entry, denying Swalley’s Motion for Summary Judgment, and granting the State’s Cross Motion for Summary Judgment. The trial court refused to consider the non-certified transcript pages and this court’s decision in *State v. Swalley*, 2011-Ohio-2092, as being “not the type of evidence specifically authorized under Civ.R. 56(C).” With respect to “the remaining evidence,” i.e., Swalley’s affidavit, the trial court held that Swalley failed to demonstrate that he was entitled to judgment as a matter of law. “Viewing the Defendant’s motion for summary judgment in a light most favorable to Plaintiff, reasonable minds can come to but one conclusion, * * * [n]o genuine issue of material fact remains to be litigated, and Defendant is entitled to judgment as a matter of law.”

{¶9} On July 5, 2012, Swalley filed a Notice of Appeal. On appeal, Swalley raises the following assignment of error:

{¶10} “[1.] The trial court erred in granting appellee’s motion for summary judgment and denying appellant’s motion for summary judgment.”

{¶11} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows “that there is no genuine issue as to any material fact” to be litigated, (2) “[t]he moving party is entitled to judgment as a matter of law,” and (3) “it appears

from the evidence * * * that reasonable minds can 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 * * * construed most strongly in the party's favor." A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Under this standard, the reviewing court conducts an independent review of the evidence before the trial court and renders a decision de novo, i.e., as a matter of law and without deference to the conclusions of the lower court. *Bd. of Rootstown Twp. Trustees v. Rootstown Water Serv. Co.*, 11th Dist. No. 2011-P-0084, 2012-Ohio-3888, ¶ 19.

{¶12} "Claimants seeking compensation for wrongful imprisonment must prove that at the time of the incident for which they were initially charged, they were not engaging in any other criminal conduct arising out of the incident for which they were initially charged." *Gover v. State*, 67 Ohio St.3d 93, 616 N.E.2d 207 (1993), syllabus. "A trial court adjudicating proof of innocence pursuant to R.C. 2743.48(A)(5) may not find that the claimant was wrongfully imprisoned based solely on an appellate court judgment vacating a felony conviction due to insufficient evidence and discharging the prisoner without a remand for a new trial." *Doss*, 2012-Ohio-5678, at paragraph two of the syllabus.

{¶13} "Resolution of a motion for summary judgment does not include trying the credibility of witnesses. If an issue is raised on summary judgment, which manifestly turns on the credibility of the witnesses because his testimony must be believed in order to resolve the issue, and the surrounding circumstances place the credibility of the witness in question -- for example, where the potential for bias and interest is evident --

then, the matter should be resolved at trial, where the trier of facts has an opportunity to observe the demeanor of the witness.” (Citation omitted.) *Dempsey v. State*, 8th Dist. No. 94315, 2010-Ohio-5134, ¶ 25.

{¶14} Applying these principles to the record before us, the trial court’s grant of summary judgment must be reversed. The sole issue to be determined was whether Swalley committed the offense of Illegal Possession of Chemicals for the Manufacture of Drugs. This court’s reversal of Swalley’s conviction in *State v. Swalley*, 2011-Ohio-2092, is not determinative of that issue. Swalley’s affidavit, however, attests, not only that he avoided conviction of the Possession charge, but that he did not commit such a crime. In the affidavit, Swalley either denied possessing the incriminating materials on which his conviction was based or asserted their use for a lawful purpose. See R.C. 2925.041(A) (“[n]o person shall knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance * * * with the intent to manufacture a controlled substance”). Construing this evidence in Swalley’s favor, a genuine issue of material fact exists as to whether Swalley committed the crime of Illegal Possession of Chemicals.

{¶15} The State introduced no contrary evidence, but contended that the affidavit “is not sufficient to fulfill Plaintiff’s burden of affirmatively proving his innocence of the crime for which he was convicted.” We disagree. Swalley’s sworn claim of innocence and explanation of the incriminating evidence constitutes evidence which, if believed, is sufficient to affirmatively prove his innocence. Accordingly, in order to affirm the trial court’s grant of summary judgment in the State’s favor, there would have to be “no genuine issue as to any material fact,” so that the State would be “entitled to judgment as a matter of law.” Civ.R. 56(C). The record before us does not support that

conclusion. See, e.g., *Ballard v. State*, 8th Dist. No. 97882, 2012-Ohio-3086, ¶ 16-17, 28 (trial court erred in granting the State’s unsupported motion for summary judgment contrary to the evidence of petitioner’s affidavit); *Henderson v. State*, 11th Dist. No. 2006-T-0033, 2007-Ohio-208, ¶ 34 (where both parties filed motions for summary judgment and the petitioner satisfied its initial burden under *Dresher*, “the state of Ohio must point to some evidence that affirmatively demonstrates that [the petitioner] has no evidence to support his claim”).

{¶16} In the present case, a genuine issue of material fact exists regarding Swalley’s innocence of the crime for which he was convicted that precludes a grant of summary judgment in favor of either party. Although the affidavit is not contradicted, the truthfulness of Swalley’s claims relies wholly on his credibility, which must be determined by the trier of fact. *Dempsey*, 2010-Ohio-5134, ¶ 25.

{¶17} The sole assignment of error is with merit.

{¶18} For the foregoing reasons, the judgment of the Ashtabula County Court of Common Pleas, granting summary judgment in the State’s favor, is reversed and this matter is remanded for further proceedings consistent with this opinion. Costs to be taxed against appellee.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.