

IN THE COURT OF CLAIMS OF OHIO

KENNETH MUSGRAVE, #383-562 :
P.O. Box 120 :
Lebanon, Ohio 45036 : Case No. 2002-06065-AD

Plaintiff : MEMORANDUM DECISION

v. :

OHIO DEPT. OF REHABILITATION :
AND CORRECTION :

Defendant :

: : : : : : : : : : : : : : :

For Defendant: Gregory C. Trout, Chief Counsel
Department of Rehabilitation and
Correction
1050 Freeway North
Columbus, Ohio 43229

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FINDINGS OF FACT

{¶1} 1) On May 21, 2002, at approximately 7:30 a.m., plaintiff, Kenneth Musgrave, an inmate incarcerated at defendant's Warren Correctional Institution, left his cell to report to work. Plaintiff indicated his cellmate left the cell at the same time. Plaintiff asserted his cell door was securely locked when he left for work.

{¶2} 2) At approximately 10:30 a.m. on May 21, 2002, plaintiff returned to his cell and discovered several items of his personal property were missing. The missing property consisted of commissary purchases including soft drinks, drink mixes, canned meats, tobacco products, candy, packaged baked goods, and chips. Plaintiff immediately informed defendant's personnel about the loss

of his property. A cell search was conducted, but no commissary articles were recovered.

{¶3} 3) Plaintiff has alleged his cell was unlocked by defendant's duty officer thereby allowing an unidentified thief access to the commissary items stored in the cell. Defendant neither admitted nor denied unlocking plaintiff's cell. Plaintiff has not submitted sufficient evidence to establish his cell door was unlocked by defendant facilitating a theft attempt.

{¶4} 4) Plaintiff filed this complaint seeking to recover \$115.69, the replacement value of his property, which plaintiff asserts was stolen as a proximate cause of negligence on the part of defendant's personnel. Plaintiff submitted the filing fee with the complaint.

{¶5} 5) On August 21, 2002, defendant filed an investigation report denying liability for the loss of plaintiff's personal property. Defendant asserts plaintiff offered no proof defendant's agents left his cell door open.

{¶6} 6) On September 18, 2002, plaintiff filed an untimely response to defendant's investigation report. However, plaintiff provides no proof with regard to defendant's actions concerning his cell door.

CONCLUSIONS OF LAW

{¶7} 1) The mere fact that a theft occurred is insufficient to show defendant's negligence. *Williams v. Southern Ohio Correctional Facility* (1985), 83-0791-AD; *Custom v. Southern Ohio Correctional Facility* (1985), 84-02425. Plaintiff must show defendant breached a duty of ordinary or reasonable care. *Williams*, supra.

{¶8} 2) Defendant is not responsible for thefts committed by inmates unless an agency relationship is shown or it is shown that defendant was negligent. *Walker v. Southern Ohio Correctional Facility* (1978), 78-0217-AD.

{¶9} 3) This court in *Mullett v. Department of Correction*

(1976), 76-0292-AD, held that the defendant does not have the liability of an insurer (i.e., is not liable without fault) with respect to inmate property, but that it does have the duty to make "reasonable attempts to protect, or recover" such property.

{¶10} 4) Although not strictly responsible for a prisoner's property, defendant had at least the duty of using the same degree of care as it would use with its own property. *Henderson v. Southern Ohio Correctional Facility* (1979), 76-0356-AD.

{¶11} 5) Defendant, when it retains control over whether an inmate's cell door is to be open or closed, owes a duty of reasonable care to inmates who are exclusively forced to store their possessions in the cells while they are absent from the cell. *Smith v. Rehabilitation and Correction* (1978), 77-0440-AD.

{¶12} 6) However, in the instant claim, plaintiff has failed to prove defendant negligently or intentionally failed to secure plaintiff's cell thereby facilitating theft attempts. *Stevens v. Warren Correctional Institution* (2000), 2000-05142-AD.

{¶13} 7) Plaintiff has the burden of proving, by a preponderance of the evidence, that he suffered a loss and that this loss was proximately caused by defendant's negligence. *Barnum v. Ohio State University* (1977), 76-0368-AD.

{¶14} 8) Plaintiff must produce evidence which affords a reasonable basis for the conclusion defendant's conduct is more likely than not a substantial factor in bringing about the harm. *Parks v. Department of Rehabilitation and Correction* (1985), 85-01546-AD.

{¶15} 9) Plaintiff has failed to prove, by a preponderance of the evidence, any of his property was lost as a proximate result of any negligence on the part of defendant. *Fitzgerald v. Department of Rehabilitation and Correction* (1998), 97-10146-AD.

{¶16} Having considered all the evidence in the claim file and adopting the memorandum decision concurrently herewith;

{¶17} IT IS ORDERED THAT:

{¶18} 1) Plaintiff's claim is DENIED and judgment is rendered in favor of defendant;

{¶19} 2) The court shall absorb the court costs of this case in excess of the filing fee.

DANIEL R. BORCHERT
Deputy Clerk

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