

[Cite as *Dave v. Lebanon Correctional Inst.*, 2003-Ohio-3593.]

IN THE COURT OF CLAIMS OF OHIO

|                                     |   |                            |
|-------------------------------------|---|----------------------------|
| MARLON DAVE                         | : |                            |
| Plaintiff                           | : |                            |
| v.                                  | : | CASE NO. 2003-01636-AD     |
| LEBANON CORRECTIONAL<br>INSTITUTION | : | <u>MEMORANDUM DECISION</u> |
| Defendant                           | : |                            |
|                                     | : |                            |

FINDINGS OF FACT

{¶1} 1) On April 28, 2002, plaintiff Marlon Dave, an inmate incarcerated at defendant, Lebanon Correctional Institution (LeCI), was transferred from the institution's general population to a disciplinary confinement unit for an internal rule violation.

{¶2} 2) Plaintiff's personal property was inventoried and packed by a member of defendant's staff incident to the disciplinary confinement transfer. Plaintiff's cellmate, Christian Pearson assisted in the packing of plaintiff's property.

{¶3} 3) Plaintiff was subsequently transferred from LeCI to the Southern Ohio Correctional Facility (SOCF) on or about November 7, 2002. All of plaintiff's property items which had been stored under the control of LeCI personnel were forwarded to SOCF. Plaintiff complained multiple articles of his property were not forwarded to SOCF.

{¶4} 4) Plaintiff related the following items he possessed at LeCI were not sent to SOCF: twenty-four cassette tapes, a radio, a remote control, an antenna, three books, a set of headphones, a power strip socket, three knee braces, and miscellaneous commissary. Plaintiff suggested LeCI staff failed to pack all his personal property when he was transferred to disciplinary confinement on April 28, 2002. Plaintiff asserted his cellmate, inmate Pearson, knowingly prevented his property from being packed when

assisting with the April 28, 2002 pack-up. Plaintiff contended his property which was left in his cell, was either kept by inmate Pearson or given away by inmate Pearson.

{¶5} 5) Plaintiff submitted a statement from inmate Pearson regarding his recollection of the April 28, 2002 pack-up and ensuing events. Pearson claimed he returned to his and plaintiff's cell on April 28, 2002 when LeCI staff had nearly completed the packing of plaintiff's property. Pearson attested several items of plaintiff's property were not packed and were "left behind" in the cell. After the pack-up was completed, Pearson explained he gathered plaintiff's Walkman, bowl, and pitcher, delivered the articles to defendant's employee, Sgt. Murray, and informed him several items of plaintiff's property still remained in the cell. Pearson related, several days after April 28, 2002, he delivered eighteen cassette tapes, a set of headphones, and a power strip socket to another inmate identified as Mr. "Yarboro." Pearson professed the tapes, headphones, and socket all belonged to plaintiff and had been left in the cell since April 28, 2002.

{¶6} 6) Plaintiff asserted he received a letter from Christian Pearson on April 30, 2002, two days after being transferred to the LeCI disciplinary confinement unit. Plaintiff submitted a copy of this letter in which Pearson addresses the matter of unpacked property remaining in plaintiff's cell. In the letter, Pearson wrote he gave plaintiff's ring, food, tapes, and stuff to a person identified as "Kev." Pearson seemingly suggested he retained items of plaintiff's property including more cassette tapes. Pearson wrote to ask plaintiff where and to whom he wanted the retained property distributed. From this letter it appears Pearson acknowledged he voluntarily prevented defendant's personnel from packing plaintiff's property and retained the property for safekeeping pending plaintiff's instructions regarding distribution.

{¶7} 7) On October 7, 2002, defendant filed a theft report concerning plaintiff's property he alleged was stolen on or about April 28, 2002. The property theft was seemingly first reported on June 5, 2002 and items allegedly stolen included a set of headphones, shoes, a power strip, and nineteen cassette tapes. Plaintiff submitted a copy of the report. However, the submitted copy is mostly illegible.

{¶8} 8) Plaintiff filed this complaint seeking to recover \$365.91, the total replacement cost for his alleged missing property. Plaintiff implied his property was lost or

stolen as a proximate cause of negligence on the part of defendant. Plaintiff submitted the filing fee with the complaint.

{¶9} 9) Defendant filed an investigation report admitting liability for the loss of plaintiff's remote control and television antenna. Defendant acknowledged plaintiff suffered damages in the amount of \$18.11 for these lost articles, plus filing fee reimbursement. However, defendant denied any responsibility for the loss of any other property claimed.

{¶10} 10) Defendant denied any liability for the loss of any cassette tapes incident to the April 28, 2002 pack-up of plaintiff's property. Defendant asserted plaintiff's property was packed on April 28, 2002 with the assistance of plaintiff's cellmate Christian Pearson. According to defendant, plaintiff filed a grievance on or about June 20, 2002, complaining his cassette tapes were not among his packed property, but were in the possession of inmate Pearson. Pearson turned over all tapes in his possession to defendant. Plaintiff was permitted to inspect these tapes, sort out the ones that belonged to him, and place the sorted items with this other packed property. On or about September 10, 2002, plaintiff filed another grievance stating an inmate identified as Yarborough #249-005, was in possession of his tapes. Upon investigation of this complaint, eleven additional tapes were added to plaintiff's property. All tapes received by LeCI staff were apparently forwarded to SOCF when plaintiff was transferred.

{¶11} 11) Defendant asserted the alleged missing radio and power strip socket were packed and forwarded to SOCF. Defendant denied these articles were lost.

{¶12} 12) Defendant contended headphones, books, and commissary items were not packed at either LeCI or SOCF. Defendant denied receiving delivery of this property, and consequently, denied liability.

{¶13} 13) Evidence has shown defendant packed three knee braces at LeCI which were not forwarded to SOCF. However, defendant denied liability for any lost knee braces due to the fact plaintiff cannot offer any proof he rightfully owned the knee braces. Defendant argued plaintiff has failed to produce evidence he obtained the knee braces legitimately, either by a commissary purchase (the institution commissary does not sell knee braces) or issuance through the institution medical department.

{¶14} 14) On March 26, and April 7, plaintiff filed motions for extension of time to submit a response to defendant's investigation report. On April 11, 2003, plaintiff filed a response addressing the issues presented. Plaintiff admitted cassette tapes were returned to him that had previously been in the possession of inmates, Pearson and Yarborough. Plaintiff maintained a total of six tapes were recovered and he has insisted twenty-four tapes were either lost while under defendant's control or not packed by defendant. Plaintiff acknowledged he loaned tapes to fellow inmates, but he has denied the alleged twenty-four missing tapes had been loaned. Additionally, plaintiff reasserted other property items claimed were either not packed by defendant or lost while under defendant's control. Furthermore plaintiff stated he has recovered one of the alleged missing books and has requested his damage claim be reduced to reflect this recovery. Plaintiff did not offer any evidence to prove he rightfully owned the knee braces.

{¶15} 15) Evidence has shown plaintiff's radio was packed by LeCI personnel on April 28, 2002. Evidence has shown the radio was not forwarded to SOCF when plaintiff was transferred to that institution.

{¶16} 16) On April 29, 2003, plaintiff filed a supplemental response. Plaintiff again asserts he had possession of his personal property prior to his transfer to SOCF.

#### CONCLUSIONS OF LAW

{¶17} 1) Plaintiff has no right to assert a claim for property in which he cannot prove he maintained an ownership right. *DeLong v. Department of Rehabilitation and Correction* (1988), 88-06000-AD; *Johnson v. Southern Ohio Correctional Facility* (2000), 00-07846-AD. Therefore, plaintiff's claim for knee braces is denied.

{¶18} 2) 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.

{¶19} 3) 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.

{¶20} 4) 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.

{¶21} 5) Plaintiff's failure to prove delivery of a set of headphones, twenty-four cassette tapes, books, and commissary to defendant constitutes a failure to show imposition of a legal bailment duty on the part of defendant with respect to stolen or lost property. *Prunty v. Department of Rehabilitation and Correction* (1987), 86-02821-AD. Plaintiff's claims for these items are denied.

{¶22} 6) Plaintiff has failed to prove, by a preponderance of the evidence, any tapes or power strip socket were lost or stolen as a proximate result of any negligent conduct attributable to defendant. *Fitzgerald v. Department of Rehabilitation and Correction* (1998), 97-10146-AD.

{¶23} 7) Negligence has been shown in respect to the loss of an antenna, a remote control, and a radio. *Baisden v. Southern Ohio Correctional Facility* (1977), 76-0617-AD; *Stewart v. Ohio National Guard* (1979), 78-0342-AD.

{¶24} 8) Defendant is liable to plaintiff in the amount of \$67.11, plus the \$25.00 filing fee which may be reimbursed as compensable damages pursuant to the holding in *Bailey v. Ohio Dept. of Rehab. and Corr.* (1990), 62 Ohio Misc. 2d 19.

{¶25} Plaintiff's motions for extension of time are MOOT. Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, plaintiff's claim is GRANTED in part and DENIED in part and judgment is rendered in favor of plaintiff in the amount of \$92.11 which includes the filing fee. Court costs are assessed against defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry per the journal.

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DANIEL R. BORCHERT  
Deputy Clerk

Entry cc:

Marlon Dave, #376-538

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